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THE HEDAYA



COMMENTARY
ON THE ISLAMIC LAWS

Translated by
CHARLES HAMILTON



DARUL - ISHAAT

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GOVERNOR-GENERAL AND COUNCIL
OF
BENGAL,

BY
CHARLES HAMILTON.

VOL. II.

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T R A N S L A T I O N
 OF THE
H E D Â Y A;
 A
 C O M M E N T A R Y
 ON THE
 M U S S U L M A N L A W S.

B O O K VII.

OF *HOODŌD*, or *PUNISHMENTS*. *

HOODŌD is the plural of *Hidd*; and *Hidd* in its primitive sense signifies obstruction; whence a porter or gatekeeper is termed the *Hiddid*, or obstructor, from his office of prohibiting people from entering. In law it expresses the correction appointed and specified by the law on account of the right of God, and hence the extension of the term *Hidd* to retaliation is not approved, since retaliation is due as a right of *man*, and not as a right of *God*; and in the

Definition of
Hidd.

These are here confined solely to *whoredom*, *drunkenness*, and *slander*. The punishments for *theft*, &c. are treated of under their proper heads.

same manner, the extension of it to *Tazeer* (or discretionary chastisement) is not approved, as *Tazeer* is a species of correction not specified or determined by any fixed rules of law, but committed to the discretion of the *Kázee*. The original design in the institution of *Hidd* is *determent*, that is, warning people from the commission of offensive actions: and the *absolution* of the person punished is not the original design of it, as is evident from its being awarded to *infidels* in the same manner as to *Mussulmans*.

- Chap. I. Of *Zinna*, or Whoredom *.
- Chap. II. Of the carnal Conjunction which occasions Punishment, and of that which does *not* occasion it.
- Chap. III. Of Evidence in Adultery and of Retraction therefrom.
- Chap. IV. Of *Hidd-Shirrub*, or the Punishment for drinking Wine.
- Chap. V. Of *Hidd-Kazaf*, or the Punishment for Slander.
- Chap. VI. Of *Tazeer*, or Chastisement.

C H A P. I.

Of *Zinna*, or Whoredom.

Whoredom
may be estab-
lished by
proof, or by
confession.

WHOREDOM is established before the *Kázee*, in two different modes,—by *Proof*, and by *Confession*;—by *proof*, because that is a demonstration founded on the appearance of facts;—and by *confession*, because probability is most in favour of the truth in such acknowledgment, especially, where it is to be the occasion of suffering and

* Meaning either *adultery* or *fornication*.

shame

shame to the person confessing;—and whoredom being an act the nature of which most frequently excludes the possibility of *positive* proof, it is necessary that *circumstantial* evidence be admitted as sufficient to establish it, lest the door of correction might be shut.

THE manner of giving evidence to whoredom is, by four persons bearing witness against a man and a woman that they have committed whoredom together, because God has commanded in the *Koran*, saying, “PRODUCE FOUR WITNESSES FROM AMONG YOU AGAINST THEM;” and also, “IF ANY PERSON ADVANCE A CHARGE OF WHOREDOM AGAINST OTHERS OF CHASTE REPUTE, AND CANNOT PRODUCE FOUR WITNESSES IN SUPPORT OF HIS ACCUSATION, LET HIM BE PUNISHED WITH EIGHTY STRIPES:” moreover, the prophet once said to a man who brought before him an accusation against his own wife, “*Bring four men who may bear testimony to the truth of your allegation:*” and this degree of proof is also required, because it is laudable to conceal and cover infirmity, and the contrary is prohibited; and by requiring no fewer than four witnesses to a charge of whoredom both these ends are obtained.

To establish it upon *proof* four witnesses are required,

WHEN witnesses come forward to bear evidence in a case of whoredom, it is necessary that the *Kázee* examine them particularly concerning the nature of the offence; that is, that he ask of each witness respectively, “What is whoredom?” and, “in what manner have the parties committed it?” and “where?” and “at what time,” and “with whom?”—because the prophet interrogated *Múaz* as to the manner of the fact, and the nature of the offence: and also, because examination in all these particulars is a necessary caution, since it is possible that the witnesses, by the term *Zinna*, may mean something not directly amounting to carnal conjunction, (such as *seeing* and *touching*,) *Zinna* being a phrase occasionally applied to these also:—it is possible, moreover, that the whoredom may have been committed in a *foreign* country, and therefore that it is not cognizable; or it may have been committed at a distant period, prior to

who must be particularly examined in respect to all the circumstances of the fact.

the charge, which is therefore inadmissible; it may happen too, that the fact may have been committed under an erroneous conception of the parties with respect to its legality, such as would occasion remission of punishment, and such as neither the parties themselves, nor the evidences against them are aware of, (as in a case where a man has connexion with the female slave of his *son*); it is therefore requisite that the judge examine the evidence minutely with respect to all these particulars, since some circumstance may appear, in the course of such investigation, sufficient to exempt from punishment.

Upon the evidence being duly given, sentence of punishment is passed.

AND when the witnesses shall thus have borne testimony completely, declaring that “they have seen the parties in the *very act* of “carnal conjunction” (describing the same), and the integrity of such evidence is also known to the *Kāzee* from both an open and a secret purgation, let him then pass sentence of *punishment for whoredom*, according to such evidence. The *apparent* probity of the witnesses does not suffice in the present case, but it is necessary that the magistrate ascertain their probity, both by an open and a secret purgation, in such a manner, that (possibly) some circumstance may appear sufficient to prevent the punishment, because the prophet has said “*Seek a pretext to prevent punishment according to your ability:*” contrary to all other cases, in which the *apparent* integrity of the witnesses is (according to *Haneefa*) held sufficient. The mode of *open* and *secret* purgation is fully set forth under the head of *Evidence*.

MOHAMMED has said, in the *Mabsoot*, that the *Kāzee* may imprison the accused, until he make a purgation of the witnesses, because the person against whom the testimony is given stands charged with whoredom upon the evidence of witnesses; and also, because the prophet once ordered a person charged with whoredom to be imprisoned: contrary to a case of *debt*, since a debtor cannot be imprisoned upon a charge of debt exhibited against him by witnesses, until their
 probity

probity be fully proved. The nature of this distinction shall be treated of at large in another place.

THE confession which establishes whoredom is made by a person of sound mind and mature age acknowledging himself (or herself) guilty of whoredom four times, at four different appearances, in the presence of the *Kázee*, he [the *Kázee*] declining to receive the confession, and sending the person away the first, second, and third time. The maturity and sanity of the person confessing are conditions, because the declaration of an infant or an idiot is not worthy of any credit, or because the acknowledgment of such is not sufficient to induce a sentence of punishment. The condition of the confession being made four times at four different appearances is agreeable to our doctors. According to *Shafe'i*, a single confession, in a case of whoredom, is sufficient, because he considers the law to be the same here as in all other cases, the confession or acknowledgment of any circumstance being the means of disclosing or discovering that which is so confessed or acknowledged; and a single confession is fully adequate to this purpose, a repetition being of no manner of use, since the disclosure or discovery is not in any degree increased or amplified by it: contrary to plurality of witnesses, as the abundance of witnesses is a means of removing all doubt with respect to their veracity, and of affording fuller satisfaction to the mind; whereas, by the repetition of the declaration of *a single person*, (as in case of *confession*,) no such additional satisfaction is obtained. The arguments of our doctors in opposition to what is here advanced by *Shafe'i* are twofold: FIRST, The case of *Milaz*, on whom the prophet would not decree any punishment until he should have made confession of his offence four different times at four different appearances, where it is to be concluded that if a single confession had sufficed, and it had been proper to proceed to punishment upon the force of it alone, the prophet would not have delayed to inflict it until the confession should be four times repeated as above;—SECONDLY, as in evidence to whoredom four

witnesses

Confession
must be re-
peated four
different
times.

witnesses are requisite, so also in the confession thereof four repetitions are requisite, and for the same reason, namely, that it is laudable to conceal infirmity; and this condition of the *repetition* of confession has a tendency to conceal infirmity. The reasons for establishing four appearances of the person confessing as a condition are twofold;—FIRST, the tradition of *Máaz*, as already related;—SECONDLY, a plurality of *confessions* is made a condition, and that cannot be obtained without a plurality of *appearances* on the part of the confessor, since one effect of an unity of place or appearance is to render the separate declaration of the same thing as *one* declaration; and hence four confessions, in a single appearance*, amount only to a single confession; and as confession relates only to the person *confessing*, the unity, or otherwise, of his *appearance*, is regarded, and not that of the *Kázee's* assembly: and this appearance is made four separate times, by the *Kázee* repelling the person's first confession, and saying to him "Thou art mad!" and such other words, the person, upon the *Kázee* thus repelling his confession, going forth, so as to be out of the *Kázee's* sight, and returning again, and repeating his confession;—and so on to the fourth time. This is recorded from *Aboo Haneefa*, on the authority of the conduct of the prophet in the instance of *Máaz*, whom he thus sent out of his sight three different times.

* The term *Majlis*, which, for the sake of perspicuity, is in this place translated *appearance*, literally signifies a *seat or place of sitting*; and it may admit of various explanations, according to the circumstance under which it is applied, or the person to whom it relates. When it is mentioned as the *Majlis* of the *Kázee*, it means the *public assembly or court* of that magistrate: when it applies solely to the parties who come to make any declaration before the *Kázee*, it may be rendered *the appearance of that party in court*. It also frequently refers to a *private company*, and sometimes merely to the *posture* of the party (as in the case of divorce left at the option of the wife.) In short, to define the true and precise application of the term *Majlis* in the present case regard must be had to the *Mussulman* usages, it being customary for the *Kázee* to admit people to deliver the substance of their testimony in a *sitting posture*, and hence every time the party arises and again resumes his seat may be rendered a *new appearance of that party in court*.

WHEN

WHEN confession shall have been made in this manner four different times, the *Kāzee* must then proceed to examine the person so confessing; asking him "What is whoredom?—and, " *where*, and " *in what manner*, and with *whom*—have you committed this whoredom?"—All which duly observed, the person confessing becomes then properly obnoxious to punishment, as the proof is complete: The advantages attending the examination of the confessing person have been already explained under the head of witnesses bearing evidence to whoredom: but it is to be observed that although it be directed there that the *Kāzee* examine the witnesses with respect to the *time* of the perpetration of the fact, yet it is not requisite to put a similar question to a person who *confesses*, because that delay which would impeach the credibility of a *witness* does not in any respect impugn the credibility of a person who makes a voluntary confession: some, however, have said that if the *Kāzee* interrogate such a person with respect to the *time* of the fact, it is lawful, since it is possible that it may have been committed during *Infancy*.

The person confessing must be particularly examined.

If the person confessing should deny the fact, and retract from his confession, either before or during the infliction of punishment, his retraction must be credited, and he must forthwith be released.—*Sbafēi* and *Ibn Lailee* have said that retraction after confession is not to be credited, but that the punishment must be inflicted, since as it has been already incurred by the confession, it cannot be done away in consequence of denial; as in a case, where whoredom is established against a person upon the testimony of witnesses;—or as in a case of retaliation, or of punishment for slander;—that is to say, when retaliation or punishment for slander are once established upon the confession of the offender, they do not drop in consequence of his subsequent denial of the fact; and so in this case likewise. The argument of our doctors is that denial after confession is an *intimation*, which (like the confession) may be either *false* or *true*; and there is no person to disprove such denial; and hence, from the inconsistency

A person may retract from his confession.

between the confession and the denial, a doubt arises concerning the confession; and punishment drops in consequence of any doubt: contrary to intimations which involve the rights of individuals, (such as retaliation, and punishment for slander,) as the claimant of the right, in those cases, is the disprover of the person who has confessed, when he afterwards denies, which is not the case in any matter involving merely a *right of the law*.

IT is laudable in the *Kāzee*, or *Imām*, before whom confession of whoredom may be made, to instruct the person confessing to deny it, by saying to him “ Perhaps you have only *kissed* or *touched* her,” because the prophet spoke so to *Mūaz*;—and Mohammed, in the *Mabsoot*, adds that the judge may also examine the confessing person with respect to such circumstances as, if made to appear, would tend to his entire exculpation, such as, “ whether the fact confessed may “ not have been committed *in marriage*,” or “ under an erroneous “ misconception of its legality ?”

SECTION.

Of the Manner of Punishment, and the Infliction thereof.

A married person convicted of whoredom is to be stoned.

WHEN a person is fully convicted of whoredom, if he be married let him undergo the punishment of *Rajim*, that is, lapidation, or stoning to death, because the prophet condemned *Mūaz* to be thus stoned to death, who was married; and he has also declared, “ *It is “ unlawful to spill the blood of a Mussulman, excepting only for three “ causes, namely APOSTACY, WHOREDOM after marriage, and MUR- “ DER*”—and in this all the companions likewise unite.

IT

It is necessary, when a whoremonger is to be stoned to death, that he should be carried to some barren place, void of houses or cultivation; and it is requisite that the stoning be executed,—first by the witnesses, and after them by the *Imám* or *Kásee*, and after those by the rest of the by-standers, because it is so recorded from *Alee*, and also, because in the circumstance of the execution being begun by the witnesses there is a precaution, since a person may be very bold in delivering his evidence against a criminal, but afterwards, when directed himself to commence the infliction of that punishment which is a consequence of it, may from compunction retract his testimony; thus causing the witnesses to begin the punishment may be a means of entirely preventing it. *Sbafí* has said that the witnesses beginning the punishment is not a requisite, in a case of *lapidation*, any more than in a case of *scourging*. To this our doctors reply that reasoning upon a case of *lapidation* from a case of *scourging* is supposing an analogy between things which are essentially different, because all persons are not acquainted with the proper method of inflicting flagellation, and hence, if a witness thus ignorant were to attempt it, it might prove fatal to the sufferer, and he would die where death is not his due: contrary to a case of *lapidation*, as that is of a destructive nature, and what every person is equally capable of executing, wherefore if the witnesses shrink back from the commencement of lapidation, the punishment drops, because their reluctance argues their retraction. In the same manner punishment is remitted when the witnesses happen to die or to disappear, as in this case the condition, namely, *the commencement of it by the witnesses*, is defeated. This is when the whoredom is established upon the testimony of witnesses: but when it is established upon the confession of the offender, it is then requisite that the lapidation be executed, first by the *Imám* or the *Kásee*, and after them by the rest of the multitude, because it is so recorded from *Alee*; moreover, the prophet threw a small stone like a bean at *Ghamdeu* who had confessed whoredom. What is said upon this subject is taken from the *Zábir-Rasvayet*.

Mode of executing lapidation.

THE corpse of a person executed by lapidation for whoredom is entitled to the usual ablutions, and to all other funeral ceremonies, because of the declaration of the prophet with respect to *Máax*, “*Do by the body as ye do by those of other believers;*”—and also, because the offender thus put to death is slain in vindication of the laws of God, wherefore ablution is not refused, as in the case of one put to death by a sentence of retaliation: moreover, the prophet allowed the prayers for the dead to *Ghamdeea*, after lapidation.

An unmarried free person is to be scourged with one hundred stripes.

If the person convicted of whoredom be *free*, but *unmarried*, the punishment with respect to him is *one hundred stripes*, according to what is said in the *Koran*, “THE WHORE AND WHOREMONGER SHALL YE SCOURGE WITH AN HUNDRED STRIPES;”—for although this text be cancelled with respect to *married* persons, yet in regard to all other than those who are married the law must be executed in conformity to it.

Mode of executing scourging.

OBSERVE that the hundred stripes inflicted by the decree of the magistrate must be administered with a rod which has no knots upon it; and that the stripes must be applied with *moderation*, that is to say, neither with severity, nor yet with too much lenity; because *Alee*, when he was about to inflict correction, used to smooth off from the rod any knots which might happen to be upon it; and as too much severity on the one hand tends to destruction, so on the other hand too much *lenity* is inadequate to the design of correction. And when punishment is to be inflicted, on any person, it is necessary that he be stripped naked; that is to say, that all the clothes be taken off, except the girdle;—because *Alee* directed so in this matter; and also, because the punishment is in this way administered with the greatest effect: but as the removal of the girdle from the body would expose nakedness, it is therefore to be left.

The stripes must not all

It is requisite that the hundred stripes be given, not all upon the

the same part or member * of the person upon whom punishment is inflicted, but upon different parts, as it might otherwise be attended with danger to life; and none of the stripes must be inflicted on the *face*, the *head*, or the *privities*, because the prophet once said to an executioner, "*In inflicting the punishment take care not to strike the* "FACE, the HEAD, or the PRIVITIES;" and also, because the first of those is the seat of expression and likewise of beauty; and the second is the central seat of the senses; and the third is a part which cannot be wounded without danger to life; and it is to be apprehended that in the first and second instance the appearance and the faculties might sustain material injury, and the injuring of those is a species of destruction to the man; and that in the last *life* might be endangered: it is unlawful therefore to strike on any of those parts, the design of correction being *amendment* and not *destruction*. *Abou Yoosaf* has said that one or two strokes may be given on the head, as *Abou Bibr* once said to an executioner, "*Strike on the head, because there the* "devil resides:" in reply to this, however, we remark that *Abou Bibr* gave this direction with respect to an infidel alien, who had been used to seduce believers from the faith, and whose life of course had been forfeited.

be given on
one part of
the body.

WHEN a man is to be scourged for whoredom he is to receive his punishment in a standing posture, because *Alee* has said, "*Correction* "is to be inflicted upon men standing, and upon women sitting;" and also, because the proper infliction of punishment depends upon it's being *open* and *publick*, which is best effected by its being received in a standing posture; but yet as a woman is nakedness †, in thus administering the correction to *her* there might be an apprehension of the exposure of nakedness. It is to be observed that in administering pu-

Scourging
must be in-
flicted upon a
man standing,
and upon a
woman sitting

* In the original, *Azee*, a limb, which would make this species of correction more properly to apply to the *bastinado*.

† "*A woman is nakedness*," that is to say, every part of a woman's person is equally indecent to be seen.

nishment it must not be inflicted in the way of *Mid**. Concerning the meaning of the term *Mid* there are various opinions:—some say that it signifies laying a person on his face upon the ground, and stretching out his limbs;—some, that it signifies the executioner drawing the rod over his own head; others, that it signifies the executioner drawing back the rod, after giving the blow; but the correction must not be inflicted in the way of *Mid*, according to any of these acceptations, as it is more than what is due.

A *slave* to receive *fifty stripes*.

If the person convicted of whoredom be a *slave*, male or female, the punishment of such is fifty stripes, because the Almighty has said [in the *Koran*] speaking of female slaves “ THEY SHALL BE “ SUBJECT TO HALF THE PUNISHMENT OF FREE MARRIED “ PEOPLE;”—and the term *slave* in the text extends to *males* as well as to *females*. Moreover, as bondage occasions the participation of only half the *blessings* of life, it also occasions the suffering of only half the *punishments*, because an offence increases in magnitude in proportion to the magnitude of *blessings* under the enjoyment of which it is committed.

A woman is not to be *stripped*.

THE punishment of whoredom is the same with respect to both sexes, as all the texts which occur in the sacred writings upon this subject extend equally to both; but yet a woman is not to be stripped, neither is her veil to be taken off, but only her *robe*, or other outward garment, as the removal of any other part of her dress would be offensive to modesty; but as the robe or outward garment would prevent the effect of the correction, and the removal of such is not indecent, she is to be stripped of these.

A WOMAN is to receive her punishment in a *sitting* posture, according to the direction of *Alee* before recited, and also, because in this regard is shewn to decency, which it is incumbent to preserve; and

* Literally *length*; it admits of various applications.

for the same reason, where a woman is to be stoned, a hole or excavation should be dug to receive her, as deep as her waist, because the prophet ordered such a hole to be dug for *Ghamdeea* before-mentioned, and *Alee* also ordered a hole to be dug for *Shoorāha Hamdeeanec*: it is however immaterial whether a hole be dug or not, because the prophet did not issue any particular ordinance respecting this; and the nakedness of a woman is sufficiently covered by her garments; but yet it is *laudable* to dig a hole for her, as decency is thus most effectually preserved. There is no manner of necessity to dig a hole for a *man*, because the prophet did not so, in the case of *Mdax*. And observe it is not lawful to *bind* a person in order to execute punishment upon him in this case, unless it appear that it cannot otherwise be inflicted.

A MASTER cannot inflict correction upon his *male* or *female* slave [for whoredom] but by permission of the *Kāzee*.—*Shafei* has said that it belongs to a master to inflict correction upon his slave, in this as well as in any other case, because a man's authority over his slaves is *general* and *absolute*, even preferably to that of the *Kāzee*, as a master is empowered to perform acts with respect to his slaves in which the *Kāzee* is not empowered; this, therefore, is the same as *Tazeer*, or discretionary correction; that is to say, the master is at liberty to inflict stated punishment for whoredom upon his slaves in the same manner as discretionary correction. The arguments of our doctors are twofold;—FIRST, the prophet has declared that there are four things committed to magistrates, and that one of those is *Hidd*, or stated punishment, which is here treated of;—SECONDLY, *Hidd*, or stated punishment, is a right of God, as the design of it is to purify the world from sin; and as it is a right of God, hence it cannot be done away by the act of any individual, wherefore this right is to be exacted by the prince, as the deputy of the law, or by the *Kāzee*, as the deputy of the prince: contrary to *Tazeer*, or discretionary correction,

Slaves cannot be punished for whoredom but by authority.

rection, because that is a right of the individual, whence it is that infants are subject to *Tazeer*, although they be not liable to *Hidd*.

Definition of
the state of
marriage
which sub-
jects an adul-
terer to lapi-
dation.

THE state of marriage necessary to induce lapidation, requires that the whoremonger be of sound understanding and mature age, and a *Mussulman*, free, and who has consummated in a lawful marriage with a woman at a time when she also is sane, free, adult, and a *Mussulima*. This is the definition of *Haneefa* and *Abou Yoozaf*. According to *Mohammed* and *Shafei* the state of marriage in question requires simply that the whoremonger be *free*, and a *Mussulman*, and one who has consummated in a lawful marriage with a woman of the same description. It is to be considered, however, that sanity of intellect and maturity of age are conditional to the receiving of punishment, since without these men are incapable of reading or understanding the ordinances of the law: and the other requisites, besides these two, are made conditions in order that the sin may appear in its greatest magnitude, from the consideration of the magnitude of those blessings under which it is committed, as ingratitude for the blessings of Providence is greatest, and most atrocious, when those blessings are enjoyed in the highest degree; now the particulars aforesaid, namely, the *Mussulman* faith, and freedom, and the enjoyment of a woman in a lawful marriage, are among the greatest blessings of life, wherefore lapidation on account of whoredom is ordained in cases where all these circumstances exist; and hence lapidation is enjoined when these conditions exist: contrary to the superiority derived from the other gifts of nature or of fortune, such as *family*, *learning*, *capacity*, *beauty*, and *wealth*, which are not conditions, because the law has no regard to those circumstances, and also, because those which have been stated are alone sufficient to constitute the magnitude of the sin of whoredom, so as to subject the offender to lapidation, since, by virtue of *freedom* a man is enabled to contract himself in a lawful marriage, and by virtue of a lawful marriage he is enabled lawfully to indulge his

his carnal appetite, and by such indulgence to allay his passions ; and by virtue of being a *Mussulman*, he is enabled to marry a *Musslima*, which fixes and confirms the belief of the prohibition of whoredom to him ; all these things, therefore, particularly forbid and inhibit a man from the commission of whoredom ; and a sin is great in proportion to the force of the inhibitions under which it is committed.—The sect of *Shafëi* differ from our doctors with respect to that part of the proposition which asserts that the profession of the *Mussulman* faith is a requisite condition : and there is also a record from *Abou Yoozaf* to the same effect. Their argument is, that in the time of the prophet a *Jew* committed whoredom with a *Jewess*, and the prophet ordered them both to be stoned :—but to this our doctors reply that the prophet passed that sentence in conformity to the *Tawreet*, or *Jewish* law, which has since been superseded by the *Mussulman* law ; and the declaration of the prophet, “ *Whoever is not a true believer shall not be regarded as married**,” is a confirmation of this. The consummation now mentioned as a condition is understood in the conjunction having taken place so far as to require the prescribed ablutions ; and as it is a condition essential to such a marriage as induces lapidation, that the *woman*, at the time of consummation, be of the same description with the *man*, in the points of *sanity*, *maturity*, *freedom*, and profession of the *faith*, it follows that if a man were to consummate with a wife who is an *idiot*, an *infant*, a *slave*, or an *infidel*, he is not considered as married in this sense, since on account of these circumstances the advantages of the matrimonial enjoyment are incomplete ; because a man has a natural aversion to consummate with a *lunatick* woman ; and he can have but little gratification with one under age, where desire is not reciprocal ; and in the same manner, he has not a strong desire to consummate with a *slave*, as in that case his children are *slave-born* ; and so also, the enjoyment of a wife who is an *infidel* affords the less satisfaction, because of the difference of reli-

* Arab. *Mahjan* ; that is, married, under the circumstances requisite to induce lapidation.

gious principles; in all these cases, therefore, the advantage of the carnal enjoyment is defective, whence the husband of such woman does not, by consummation, become a *Mahsan*, or married man, in that sense which induces lapidation.—And the rule is the same where the husband is an *idiot*,—an *infant*, a *slave*, or an *infidel*, and his wife *sane*, *adult*, and a *Musslima*.—*Aboo Yoosaf* has said that where the wife is an infidel, her husband, being a *Mussulman*, by consummating his marriage with her, becomes as a *married man*; but in reply to this, besides what has been above advanced, it is to be remarked that the prophet has declared, “*A MUSSULMAN is not rendered a married man*”
 “*by connexion with a CHRISTIAN, nor is a FREEMAN rendered mar-*”
 “*ried by connexion with a wife who is a SLAVE; nor a SLAVE by con-*”
 “*nexion with a wife who is FREE.*”

*Stoning and
scourging can-
not be united;*

IT is not lawful to unite the punishments of *stoning* and *scourging* in the same person, because the prophet has left no precedent of the kind; and also, because if they were to be united, the *scourging* would be useless, since the design of correction is a warning from vice, and this warning is effected by *lapidation* in respect only to *others* than the person so punished; for a warning cannot be effected, with respect to *the person punished*, after his destruction.

*nor (with re-
spect to a wo-
man) scourg-
ing and ba-
nishment.*

IF a woman guilty of whoredom be of mature age, in her punishment *scourging* and *banishment* cannot be united. According to *Shafei* these two may be united with respect to her by way of punishment,—that is *banishment* may also be included in her punishment,—because the prophet has declared “*If a man, being unmarried, commit whore-*”
 “*dom with a woman who is of age, the punishment of such is one hun-*”
 “*dred stripes; and he shall be excluded from the city for the space of*”
 “*one year, as by his banishment the door is shut against whoredom, be-*”
 “*cause in an unsettled situation a man meets with few female compa-*”
 “*nions to tempt him to commit it.*” The arguments of our doctors are twofold;—FIRST, God has declared “*THE WHORE AND THE*

WHOREMONGER

“WHOREMONGER SHALL YE SCOURGE WITH AN HUNDRED STRIPES,” from which it is evident that the sole punishment of such is one hundred stripes, for if it were more, it would be there mentioned, and one hundred stripes alone would not have been declared sufficient:—SECONDLY, her banishment is opening the way to the further commission of her crime, because people are under less restraint when removed from the eye of their friends and relations, as those are the persons whose censures they are most in dread of: moreover, in an unsettled situation, and among strangers, the necessities of life are with difficulty procured, whence she might be induced voluntarily to prostitute herself for a supply, which of all kinds of whoredom is the most abominable; and the saying of *Alee* that “Banishment is a means of seduction,” is founded on this second reason.—As to the saying of the prophet quoted by *Shafëi*, it is superseded, as well as the remainder of that saying, “*If a SIYEEB (meaning a man who has consummated a marriage) afterwards commit adultery with a SIYEEBA, their punishment is one hundred stripes and lapidation:*”—the way in which this is superseded is explained in its proper place. In short, banishment, with respect to a loose woman, in the way of punishment, is not lawful: but yet if the magistrate should find it advisable, he may banish her for the space of *one year*, or less, but this banishment is in the way of *Tazeer* or *discretionary correction*, as banishment may in some cases operate as a warning, wherefore it is committed to the *Kázee* or the *Imám*; and what is recorded concerning the companions, of their having *banished* people, is to be regarded in the way of *Tazeer*.

If a *sick* person, being one whose proper punishment is *lapidation*, commit whoredom, he is to be stoned, because his destruction is due, and is therefore not to be suspended on account of his illness; but if he be one whose punishment is *scourging*, the execution of it must be deferred until his recovery, lest life should be endangered, for the same reason as the limb of a sick thief is not cut off until he be in a proper habit of body to endure the amputation without risk of life.

The execution of *stoning* is not suspended on account of *sickness*:

but it is soon
account of
pregnancy.

IF a pregnant woman commit whoredom, and her punishment be *lapidation*, the execution must be delayed until her delivery, for if she were to be stoned whilst pregnant, the child would be destroyed in her womb, and its blood is not to be taken; and if her punishment be *scourging*, the execution must be deferred until she shall have recovered from her labour, as that is a species of sickness, wherefore a delay must be made until her health be perfectly restored: contrary to a case of *stoning*, where the punishment need *not* be delayed until a perfect recovery, since the delay in this case is only with a view to the preservation of the child in her womb, which is separated from her upon the instant of its birth. It is recorded from *Haneefa* that in *stoning* also the execution must be delayed until the child become independent of her care, in case there should be no other person to foster it in her stead, because by this delay the child is preserved from destruction; and it is moreover related that when *Ghamdeea*, after her delivery, came before the prophet, that he might execute punishment upon her, he said to her “*Go and remain until such time as your child is independent of you.*”—AND OBSERVE,—If a pregnant woman be convicted of whoredom *upon evidence* she must be confined in prison until she be delivered, lest she should abscond; contrary to a case where a pregnant woman is convicted upon her own confession; for in this case she is not to be confined, as her denial after confession must be credited, (for which reason punishment is remitted in case of her denial,) wherefore to *imprison* her would be useless.

A pregnant
woman, con-
victed upon
evidence, must
be impris-
oned.

CHAP. II.

Of the *Carnal Conjunction* which occasions *Punishment*,
and of that which does *not* occasion it.

Definition of
the term
Zinna.

THE carnal conjunction which occasions punishment is *Zinna*, or *whoredom*; and this, both in its primitive sense, and also in its legal acceptance,

acceptation, signifies the carnal conjunction of a man with a woman who is not his property, either by right of marriage or of bondage, and in whom he has no *erroneous* property, because *Zinna* is the denomination of *an unlawful conjunction of the sexes*, and this illegality is universally understood where such conjunction takes place devoid of propriety, either *actual* or *erroneously supposed*. What is here said is the definition of whoredom with respect to a *man*:—as to the whoredom of a *woman*, it simply signifies her admitting the man to commit the fact.

ERROR in carnal conjunction is of two kinds,—the *first*, error in respect to the *act*, which is termed *Sboobba-Ishtibáb*, or *error of misconception*; the *second*, error in respect to the *subject*, which is termed *Sboobba-Hookmee*, [error by effect,] or *Sbaba-Milk* [erroneous propriety.]—The first of these distinctions of error is not established, nor understood, but with respect to a man who mistakes an *illegal* carnal conjunction for *legal*, because *Ishtibáb* signifies the man having carnal intercourse with a woman, under the supposition of the same being lawful to him, in consequence of his supposing something other than that which is necessary to constitute legality as affording an argument of such legality; it is therefore necessary that this mistake should have operated in his mind in order to establish *Ishtibáb*, or misconception; and hence this species of error is not understood, except in the case of a person who is under such misapprehension.—The *second* species of error is established, where the argument of the legality of carnal conjunction exists in itself, but yet practice cannot take place upon it, because of some obstacle; and this does not depend upon the apprehension or belief of the person who commits the unlawful act; whence this species of error is regarded in respect to *all* men, that is to say, men who so conceive, and also those who do *not*.—And punishment drops in consequence of the existence of either of these two species of error, on account of a well-known tradition.

Definition of erroneous carnal conjunction.

Parentage is established in a case of error with respect to the *subject*, but not in a case of error with respect to the *act*:

IN a case of error of the *second* species, the parentage of the child is established in the man who has had such connexion, if he claim such child; but in a case of error of the *first* species, the parentage of the child is not to be established in the man, notwithstanding his claim,—because, in a case where the error is of the *first* species the act of generation is *positive whoredom*, although punishment be not incurred, on account of a circumstance which has reference to the man committing such act, (namely, that of the illegality of the act being misconceived by him, according to his apprehension of it;) but the act of generation, in a case of error of the *second* species, is not *positive whoredom*.

ERROR in respect to the *act* exists in eight several situations; namely, with—

- I. the female slave of a man's *mother*;—
- II. the female slave of his *father*; —
- III. the female slave of his *wife*;—
- IV. a wife repudiated by three divorces, who is in her *Edit*;—
- V. a wife completely divorced for a compensation, and in her *Edit*;
- VI. an *Am-Walid*, who is in her *Edit* after emancipation with respect to her master;
- VII. the female slave of a master, with respect to his male slave;
- VIII. a female slave, delivered as a pledge, with respect to the receiver of such pledge, (according to the *Rawdyet-Sa-beeb* in treating of punishment;)—and it is to be observed, that a *borrower*, in this point, stands in the same predicament with the *receiver of a pledge*:—

and there is no punish-

—and in all those situations the person who has carnal conjunction does not incur punishment, provided he declare—“I conceived that
“ this

“ this woman was lawful to me ; ”—but if he should acknowledge his consciousness that the woman was *unlawful* to him, he incurs punishment. ment in such case.

ERROR in respect to the *subject* exists in six situations ; namely, with—

- I. the female slave of a man's son ;
- II. a wife completely repudiated by an implied divorce ;
- III. a female slave sold, with respect to the seller, before the delivery of her to the purchaser ;
- IV. a female slave *Mamboora*,—(that is, a slave stipulated to be given *in dower* to a wife,)—with respect to the husband, before seizure of her being made by the wife ;
- V. a female slave held in partnership, with respect to any of the partners ;
- VI. a female slave delivered in pledge, with respect to the receiver of such pledge, according to the Book of Pawnage ;

—and in all those situations a person who has carnal connexion does not incur punishment, even though he should confess his consciousness of such woman being unlawful to him.

ACCORDING to *Haneefa*, a contract of marriage is a sufficient ground of error, although the illegality of such marriage be universally allowed, and the man entering into such contract be sensible of this illegality. With our other doctors, on the contrary, a contract of marriage is not admitted as a legal ground of error, if the man be sensible of the illegality.—The effect of this difference of opinion appears in a case where a man marries a woman related to him within the prohibited degrees,—as shall be hereafter explained. A contract of marriage prevents punishment, although avowedly illegal.

If a man pronounce three divorces upon his wife, and afterwards Connexion with a wife
have

thrice divorced (before the expiration of her *Edit*;) occasions punishment.

have carnal connexion with her during her *Edit*, and acknowledge his consciousness of her being unlawful to him, punishment is incurred, because here possession by *marriage*, which legalizes generation, has been totally annihilated, and hence there can be no error, as the text in the *Kôran* shews that *legality* is destroyed in this case; and all the doctors coincide in this opinion. But if he were to declare that “he conceived, or supposed, she was still lawful to him,” punishment is not incurred, because his apprehension is to be regarded, since the effects of marriage still remain, with respect to the establishment of the parentage of children, and the matrimonial restraint, and alimony; (for if the woman should bear a child, at any period within two years from the date of divorce, the parentage of such child is established in the husband, and she remains under the restraint to which she is subject in marriage, and her alimony also remains incumbent upon her husband;) his apprehension, as above pleaded, is therefore of force to prevent punishment, on account of *error by misconception*. And an *Am-Walid*, after manumission, and a woman in a state of repudiation by *Kboola*, or one divorced for a compensation, (who are in their *Edit*;) stand in the same predicament with a woman repudiated by three divorces, as their illegality is universally admitted, and certain effects of marriage continue during their *Edit*, as well as in the case of a wife under three divorces.

Connexion with a wife divorced by implication does not induce punishment;

If a man divorce his wife by *implication*, saying, “You are *divested*,” or “you are *at your own disposal*,” and she chuse divorce,—and he afterwards have carnal knowledge of her within the term of her *Edit*, and should acknowledge that he knows her to be unlawful to him, yet punishment is not incurred; because concerning this case there is a difference among the companions; for *Omar* holds that the forms above-mentioned are effective of only a single divorce reversible; and the same in all expressions of divorce by implication: he also holds the rule to be the same, where the husband intends *three* divorces, as he maintains that here likewise a single divorce reversible only

only takes place, and that the intention of three divorces is not regarded.

PUNISHMENT is not incurred by a man having carnal connexion with the female slave of his *son*, or of his *grandson*, although he should acknowledge his consciousness of such female slave being unlawful to him, for in this case the error is *by effect*, since it proceeds from an argument founded upon the words of the prophet, who said to one with whom he was conversing, “*THOU and THINE are thy FATHER’s* ;”—and the *grandfather* is subject to the same rule with the *father*, as he is also a *parent*. The parentage also of the child begotten in such carnal conjunction is established in the father aforesaid, who remains responsible to his son for the value of the female slave.

nor that with
the female
slave of a *son*
or a *grandson* :

If a person have carnal connexion with the female slave of his *father*, or his *mother*, or his *wife*, and plead his conception that such slave was lawful to him, he does not incur punishment ; neither is his accuser liable to punishment :—(but if he should acknowledge his consciousness of the illegality, punishment is to be inflicted upon him, —and the same rule obtains where a slave has connexion with the bondmaid of his master,) because between these there is a community of interests in the acquisition of profit ; and hence the man who commits the act may in those cases have conceived, with respect to the *enjoyment*, that this species of usufruct is also lawful to him, —wherefore error by misconception is applicable to him ; but nevertheless this is *actual whoredom*, for which reason punishment is not incurred by the *accuser*. The law is the same, (according to the *Zabir Rawdyet*,) if the female slave, in either of these cases, were to plead her supposing that the act was lawful, without any such plea on the part of the man, —because the carnal conjunction of a man and a woman being *one act*, it follows that a plea of supposed legality, made by *either* party, establishes *error* with respect to *both* ; and hence the punishment of both is abrogated.

or of a *father*,
mother, or
wife, (where
misconcep-
tion is plead-
ed.)

IF

Punishment is incurred by connexion with the slave of a brother.

If a man have carnal connexion with the bondmaid of his *brother*, or of his *uncle*, he incurs punishment, although he should plead that he had conceived her to be lawful to him, because between such relations no community of interest exists. And the law is the same with respect to the female slaves of all other relations within the prohibited degrees, excepting those who are related to the man within the *parental* degree, (such as his *father* or his *son*,) because between him and those prohibited relations no community of interest exists.

Connexion with a woman married by mistake does not occasion punishment.

If a man engage in a contract of marriage with a woman, and another woman be sent to him *, the female relations declaring her to be the woman married to him by such contract, and he have carnal communication with that woman, he does not incur any punishment; but yet he must pay the woman her dower, because *Alee* once passed a decree to this effect;—and he also subjoined, in his decree, that the woman should observe an *Edit*:—moreover, the man has proceeded upon *apparent proof*, namely, the information of the woman's female relations, with respect to the subject of his error, since men can have no personal knowledge of or acquaintance with their wives prior to the matrimonial engagement; and hence the man in this case is the same as a person acting under a deception. And the accuser of this person does not incur the punishment of slander, because possession by *marriage*, requisite to legalize generation, is in no respect established. There is an opinion recorded from *Abou Yoosaf*, that the accuser is liable to punishment, because the carnal conjunction is to all appearance legal, with respect to the man, according to the information of the woman's female relations, and of course his accuser becomes liable to punishment, as a decree must be founded upon what is *apparent*.

* It is almost unnecessary to remark that, from the nature of the *Mussulman* customs, a man can never be supposed to have seen his wife until after marriage,—the woman being utterly excluded from the sight of all men except her relations *within the prohibited degrees*.

If a man have carnal connexion with a woman whom he finds in his own bed, punishment is incurred by him, because there can be no *error* where he passes any length of time in the company of his wife, and thence his apprehension of this woman being his wife, from the circumstance of his finding her in bed, is not regarded, so as to prevent punishment:—the reason of this is that sometimes a relation of the wife, residing in the house with her, may sleep upon her bed. And the law is the same where the man is *blind*, because it is always in his power to ask and discover who the woman is; and he may also discover this by the sound of her *voice*. But yet if he invite the woman to the act, and she consent, signifying that “she is his wife,”—and he copulate with her, in this case he does not incur punishment, as he is deceived by the woman's declaration and behaviour.

If a man marry a woman whom it is not lawful for him to marry, and afterwards have carnal connexion with her, he does not incur punishment, according to *Haneefa*; but if he be at the time aware of illegality, he is to be corrected by a *Taxeer*, or *discretionary* correction. The two disciples and *Sbaf'i* have said that he is liable to punishment, when he marries the woman, being aware of the illegality, because, as the contract has not been executed in regard to its proper subject, it is of course void; for here the woman is not a proper subject of marriage, because the proper subject of marriage, or of any other deed, is a thing which is a proper subject of the *effects* of such deed; now one of the effects of marriage is the legalizing of generation; but as the woman is among those who are prohibited to the man, the contract of marriage with her is consequently nugatory, in the same manner as a contract of marriage between *man and man*. The argument of *Haneefa* is that the contract has taken place in regard to its proper subject, as the woman is a proper subject of marriage, because the proper subject of any deed is a thing which admits of the ends intended being obtained from it; now the end of marriage is

Connexion with a woman under an unlawful marriage does not induce punishment.

the procreation of children, and to this every daughter of Adam is competent; the case therefore admits of the contract being engaged in with respect to all its effects, and of all its effects being obtained from it; but on account of the prohibition in the sacred text, the legalization of generation is not obtained; and such being the case error is occasioned, as error is a thing which is the *appearance* of a proof, and not the *substance* of one; and as, in the present case, the man has perpetrated an offence for which the *stated* punishment, or *Hidd*, is not appointed, *Tazeer*, or discretionary correction, must be inflicted.

Acts of lasciviousness are to be corrected by *Tazeer*;

If a man commit any act of lasciviousness with a strange woman such as *Takhsfeen* *, he is to be corrected by *Tazeer*, since such acts are illegal and forbidden by the word of God: but a stated punishment is not appointed for them; *Tazeer* must therefore be inflicted upon that person.

and so likewise sodomy, committed with a strange woman;

If a man copulate with a strange woman *in ano*,—(that is, commit the act of *sodomy* with her,) there is no stated punishment for him, according to *Haneefa*; but he is to be corrected by *Tazeer*. The *Jama Sagbeer* directs an aggravation of the *Tazeer* or correction in this case, and says that the offender must be kept in a place of confinement until he declare his repentance. The two disciples have said that as this act resembles whoredom, the person committing it is subject to the stated punishment for whoredom; and there is one opinion of *Shafei* to this effect; but another opinion of his is that the parties should be put to death, of whatever description they may be,—that is, whether they be *married* or not,—because the prophet has said “*Slay both the ACTIVE and the PASSIVE*,” (or, according to another tradition, “*Stone both the AGENT and the SUBJECT*.”)—The argument of the two disciples is that the act in question has the

* *Penem fricens inter femora.*

property of whoredom, as that is defined to be “an act of lust committed in that which is the object of the passion, completely, and under such circumstances as to be purely unlawful, and where the design is the injection of *Semen*.” *Haneefa*, on the other hand, argues that this conjunction is not *actual whoredom*, because the companions of the prophet have disagreed concerning their decrees upon it, for some of them have said that offenders of this kind should be *burnt*, some, that they should be *buried alive*, others, that they should be *cast headlong from some high place*, such as the top of a *boufe*, and then be *stoned to death*,—and so forth: moreover, the conjunction in question has not the property of whoredom, as it is not the means of producing offspring, so as (like *whoredom*) to occasion any default in birth or confusion in genealogy;—besides, this species of carnal intercourse is of less frequent occurrence than *whoredom*, because the desire for it exists only on the part of the *active* and not of the *passive*, whereas in whoredom the desire exists equally on both sides. As to the tradition cited by *Shafei*, it probably relates to a case where an *extraordinary* and *exemplary* punishment is requisite; or where the perpetrator inculcates and insists upon the lawfulness of the act.

If a man commit *bestiality* he does not incur *Hidd*, or stated punishment, as this act has not the properties of *whoredom*, for whoredom is a heinous offence, as being a complete act of lust, to which men feel a natural propensity: but this definition does not apply to copulation with *beasts*, which is abhorred by an undepraved mind, (whence it is not held incumbent to cover or conceal the genitals of brutes;) and men can have no reason for desiring carnal connexion with *brutes*, but from the most vitiated appetite, and the utmost depravity of sentiment:—*Hidd* therefore is not incurred by this person; but he is to be punished by a discretionary correction, for the reasons already specified. It is recorded, also, that the beast should be slain any burnt: this, however, is only where the animal is not of an *eatable* species; but if it be of the eatable species it is to be *eaten*, (according

and *bestiality*.

to *Abou Haneefa*,) and not burnt. *Abou Toofaf* holds that it should be consumed with fire in both cases, the perpetrator (where it belongs to another person) remaining responsible to the owner for the value; but yet the burning of it is not *absolutely incumbent*; nor is it to be burnt for any other reason than as, by this means, all recollection of so vile a fact may be obliterated, and the perpetrator shielded from the disgrace which would attach to him in case of the animal remaining alive.

Punishment is not incurred by committing whoredom in a foreign country.

If a *Mussulman* be guilty of whoredom in a foreign country, or in the territory of the rebels, and afterwards return into a *Mussulman* state, punishment is not to be inflicted upon him, on the plea that a man, in embracing the *Mussulman* faith, binds himself to all the obligations thereof, wherever he may be. The arguments of our doctors on this occasion are twofold;—FIRST, the prophet has said “punishment is not to be inflicted in a foreign land;”—SECONDLY, the design of the institution of punishment is that it may operate as a prevention or warning; now the *Mussulman* magistrate has no authority in a foreign country, wherefore if punishment were instituted upon a person committing whoredom in a foreign country, yet the institution would be useless; for the use of the institution is that punishment may be executed; and as the magistrate has no authority in a foreign country, the execution is impossible; whence it appears that the commission of whoredom in a foreign country does not occasion punishment there: and if this person should afterwards come from the foreign territory into a *Mussulman* state, punishment cannot be executed upon him, because as his whoredom did not occasion punishment at the time of its being committed, it will not afterwards occasion it.

Punishment may be inflicted by the chief magistrate within his camp.

THE person to whom the authority of inflicting punishment officially appertains, (such as the *Khdif*, for the time being, or the governor of Egypt,) when he carries forth his troops upon an expedition, is at liberty to inflict punishment upon any person who may be guilty

guilty of whoredom within his camp, since the perpetrator of the offence is under his immediate authority; but chiefs or commanders of an inferior degree are not at liberty to inflict punishment upon persons guilty of whoredom within their camp, because they are not invested with authority to inflict punishment*.

If an alien come into a *Mussulman* state under a protection, and there commit whoredom with a *Zimmee*, or female infidel subject,—or if a *Zimmee* or *male* infidel subject so commit whoredom with a female alien, punishment is to be inflicted upon the *infidel subject*, (according to *Haneefa*) but not upon the *alien*. This also is the opinion of *Mohammed* with respect to an infidel subject, where he is guilty of whoredom with a female alien; but if an alien be guilty of whoredom with a female infidel subject, in this case he holds that there is no punishment for either party. There is also an opinion recorded from *Abou Yoosaf* to this effect; but he afterwards delivered another opinion, that punishment is incurred by all the parties concerned, both by the *alien*, and the *female* infidel subject,—and also by the *male* infidel subject; and the *female* alien,—for he argues that an alien under protection, during the time that he continues in a *Mussulman* territory, subjects himself to all the ordinances of the temporal law, in the same manner as an infidel subject does for life, whence it is that punishment for slander may be inflicted on an alien under protection, and that he may also be put to death in retaliation: contrary to punishment for drinking wine, as in his belief the use of wine is allowable. The argument of *Haneefa* and *Mohammed* is that a protected alien does not come into a *Mussulman* state as a *resident*, but is only brought there occasionally, from some particular motive, such as commerce, and the like, and therefore is not to be considered as

Case of
whoredom
committed
between in-
fidel subjects
and aliens.

* Meaning *Hidd*, which being a right of the law, is a thing of too much importance to be committed to inferior persons: but every person who acts as a commander or magistrate is entitled to inflict *Tazur*, or discretionary correction.

one of the inhabitants of a *Mussulman* country; (whence it is that he is at liberty to return into the foreign country, and also that if a *Mussulman* or an infidel subject, were to murder a protected alien, no retaliation would be exacted of them;) now a protected alien subjects himself to such of the ordinances of the law only as he himself derives an advantage from; and those are all such as respect the rights of individuals; for where he is desirous of obtaining justice for himself from others, he also subjects himself to justice being exacted on him in behalf of others; and *retaliation* * and *punishment for slander* are among the rights of individuals, but *punishment for whoredom* is a right of the law. The argument of *Mohammed* is that in whoredom the man is the *principal*, and the woman only the *accessary*, according to what was before stated; now the prevention of punishment in respect to the *principal* occasions the prevention of it in respect to the *accessary*, but the prevention of punishment with respect to the *accessary* does not occasion the prevention of it with respect to the *principal*; as in a case, therefore, where a protected alien commits whoredom with a female infidel subject, there is no punishment for the alien, so neither is there any for the infidel subject; but where an infidel subject commits whoredom with a female protected alien, punishment is to be inflicted on the subject, but not upon the alien; and the remission of punishment in respect to the alien does not occasion its remission with respect to the infidel subject, because the woman is only an *accessary*.—Correspondent to this is the case of a man committing whoredom with a girl who is an infant, or with a woman who is insane, where punishment is inflicted upon the man, but not upon the infant or the lunatick; whereas, if a woman admit a boy or an idiot to commit whoredom with her, neither of the parties is liable to punishment. The argument of *Hanefa* is that the act of the protected alien is *whoredom*, because he is equally with *Mussulmans* called to the ob-

* This is an apparent contradiction, as it is said above that there is no retaliation for the murder of an alien: it is to be considered, however, that although a *Mussulman*, or an infidel subject, be not liable to retaliation for the murder of an alien, yet the alien would be so for the murder of a *Mussulman*, or an infidel subject.

servance of certain commands and prohibitions, on account of the torments and chastisements of a future state, (according to the *Moos-hab-Sabeeb*,) although he be not called to the religious observances of the LAW; but the woman's admitting him to commit the fact is the occasion of punishment to her:—contrary to the case of the *boy* or the *idiot*, for they are not called, nor under any constraint. A difference similar to this obtains in the case of a man, who being possessed, or under the influence of magick, commits adultery with a woman not under such influence; that is to say, according to *Haneefa*, punishment is inflicted; but according to *Mohammed* it is not inflicted on either of the parties.

If a boy or an idiot commit whoredom with a woman who is of mature age and sound judgment, she consenting thereto, in this case there is no punishment, neither to the *boy*, to the *idiot*, nor to the *woman*;—*Ziffer* and *Shaf'i* maintain that in this case the woman incurs punishment; and there is also one tradition of *Abou Roosaf* to the same effect. But if a man who is of mature age and sound judgment commit whoredom with a girl who is an idiot or an infant, capable of copulation, in such case punishment is incurred by the *man* alone, according to all the doctors. The argument of *Ziffer* is that a plea on the part of the *woman* does not occasion the remission of punishment with respect to the *man*; and in the same manner, a plea on the part of the *man* does not occasion punishment to be remitted with respect to the *woman*; because each party is responsible only for their own act. The argument of our doctors is that the act of whoredom proceeds from the man, the woman being no more than merely the *subject* of it, and hence it is that the man is denominated by the *active* term in copulation or whoredom and the woman by the *passive* *.

Whoredom
committed by
an infant or
an idiot does
not induce
punishment.

* [In the original] "The man is denominated the *Walee*, or *Zamee*, and the woman the *Mutawalee*, or *Mutamee*. The two first are the active participles meaning the *copulator* and the *whoremonger*; the two second are these terms expressed in the feminine participle *passive*. It is not easy to convey the full force and meaning of such passages in any translation.

OBJECTION.—The woman is also termed *Zâneea**, as appears in the *Koran*.

REPLY.—The woman is termed *Zâneea* by a metonymical figure, which sometimes uses the *active* participle for the *passive*; or it may on this occasion be employed because the woman is the *primary* cause of the act of whoredom, by her admitting the man to the commission of it. Punishment, with respect to a *woman*, therefore, depends upon the circumstance of her admitting a man to commit the act of whoredom with her; but the act of a *boy* is not *whoredom*, as *whoredom* is an act proceeding from a person who has been called upon to refrain from it, and the perpetrator of which is an offender, by his commission of it; and as the act of a *boy* is not of this nature, it follows that punishment is not incurred by his act.

Whoredom
committed
upon compul-
sion does not
subject to pu-
nishment.

If a sovereign prince should compel a man to commit whoredom, there is no punishment incurred by that man.—*Abou Haneefa* had held a prior opinion, that the man is liable to punishment, (and such is the doctrine of *Ziffer*)—because a man cannot commit the act of whoredom unless the virile member be properly distended, which distention is a token of desire on his part:—*compulsion*, therefore, cannot be proved with respect to him. The reason for the more recent opinion is that the *means* of compulsion, (namely, the power of the sovereign,) exists both actually and apparently; and the distention of the virile member is no certain proof of desire, since it sometimes occurs independant of any operation of the mind, as in *sleep*, for instance; this circumstance, therefore, is of no weight in competition with a fact which admits of *actual proof*, namely, the *compulsion*. But if any other person than the sovereign should compel a man to commit whoredom, the man thereby incurs punishment according to *Haneefa*. The two disciples have said that no punishment is incurred in this case, because the compulsion which is the obstruction to the punish-

* The *sem.* act, part. from *Zinne*.

ment in the former cases may also proceed from *others* than the sovereign: but *Haneefa* argues that this species of compulsion cannot be supposed to proceed from any except the *sovereign*;—because no other person is possessed of the means of such compulsion, since the sovereign is enabled to repel it in all inferior persons, as the sovereign authority is instituted by the law for the purpose of repelling tyranny;—and also, because all others stand in awe of the sovereign, and hence no such compulsion can proceed from them. It is to be remarked that the learned in the law impute this difference of opinion between *Haneefa* and the two disciples to the difference of the times in which they lived,—for in the time of *Haneefa* others than the sovereign were not possessed of any power which it was not in the sovereign's power to repel; but in the time of the two disciples every petty ruler possessed a power independant of the sovereign, and hence the compulsion of *others* than the sovereign afforded (in those times) a ground of doubt sufficient to prevent punishment.

If a man make a confession four times, at four different appearances, [before the *Kâzee*] “ that he has committed whoredom with such a woman,” and the woman should thereupon declare, “ that he had married her,”—Or, if a woman should thus make confession that “ such a man had committed whoredom with her,” and the man should plead that “ he had been already married to her,”—in this case no punishment falls upon either party, because the plea of marriage is possibly true, and therefore occasions a demur; but the man owes the woman a dower, since the enjoyment of the woman's person cannot be admitted *gratuitously*, as a woman's person is an object of respect.

Case of one of the parties confessing whoredom, and the other pleading a marriage.

If a man commit whoredom with the female slave of another, to such a degree as that the said female slave dies, the man incurs two penalties,—*one*, the punishment of whoredom, and the *other*, the payment of the value of such slave to her owner,—because he has

Case of whoredom with the female slave of another, who dies in consequence;

here committed two offences, *whoredom* and *murder*, and hence the law is to be carried into execution with respect to both. It is recorded from *Abou Yoosaf* that punishment is not incurred by the man because the obligation of responsibility, which lies upon him, is a cause of his property in the slave; and the occurrence of a cause of property, before punishment has taken place, prevents the infliction of it, (as where, a thief, for instance, purchases the property stolen of the proprietor before his hand is struck off,) and is the same as if a man were first to commit whoredom with a female slave, and then to purchase her of her master, in which case he incurs punishment, according to *Haneefa*, but not according to *Abou Yoosaf*, and so in this case likewise. *Haneefa* and *Mohammed* say that the responsibility, in this case, is a responsibility for *murder*, (in the manner of the *Deeyat*, or *fine of blood*,) which does not occasion a right of property [over the *slain*.]

or who goes
blind.

If a man commit whoredom with the female slave of another, to such a degree that she loses her sight, he owes the price of the said slave to her owner, and punishment drops, because the slave, by the man being thus responsible for her value, becomes his property, and she is still actually existing; wherefore the circumstance of his thus obtaining a property in her occasions a demur sufficient to prevent the punishment.

The *sovereign* is not punishable, but is responsible for property, and liable to retaliation.

If a supreme ruler (such as the *Kbálif*, for the time being) commit any offence punishable by law, such as *whoredom*, *theft*, or *drunkenness*, he is not subject to any punishment, (but yet if he commit *murder* he is subject to the law of retaliation, and he is also accountable in matters of property,)—because *punishment* is a right of God, the infliction of which is committed to the *Kbálif* [or other supreme magistrate,] and to none else; and he cannot inflict punishment upon himself, as in this there is no advantage, because the good proposed in punishment is that it may operate as a warning to deter mankind

mankind from sin, and this is not obtained by a person's inflicting punishment upon himself: contrary to the rights of the *individual*, such as the laws of *retaliation*, and of *property*, the penalties of which may be exacted of the *Kbálif*, as the claimant of right may obtain satisfaction either by the *Kbálif* empowering him to exact his right from himself, or by the claimant appealing for assistance to the collective body of the *Mussulmans*. And punishment for slander, (although it be in some shape a right of the *individual*,) is subject to the same rule with other punishments which are a right of God, as the learned have declared that in the punishment for slander the right of God is chiefly considered.

C H A P. III.

Of Evidence in *Whoredom*, and of Retraction therefrom.

IF witnesses bear evidence at a distant period * [after the perpetration of the alleged offence,] where there had existed no obstruction (such as their distance from the magistrate, and so forth,) their testimony is not to be credited, except in a case of *slander*. It is recorded in the *Jama Sagbeer*,—"If witnesses bear evidence against any person, with
 " respect to *theft*, or *wine-drinking*, or *whoredom*, after a certain period of time shall have elapsed, such testimony is not to be received;
 " but yet the person so accused of theft is responsible for the value of
 " the goods alleged to have been stolen." The principle upon which this case proceeds is, that all evidence, with respect to such punish-

Delay in giving evidence destroys the validity of it, except in cases of slander.

* Arab. *Mookhádim*: this is the participle from *Takádim*; by which is understood such a distance of time as suffices to prevent punishment. It operates in a way somewhat similar to our *statutory limitations*.

ments as are purely a right of God, is vitiated and rendered void by such a delay in the production of it as amounts to *Takádim*; but with *Shaf'í* it is not rendered void, for he considers those punishments as a right of the individual, and supposes evidence under this circumstance to be the same as confession inducing punishment; that is to say, as distance of time [*Takádim*] does not affect the validity of confession, inducing a distant punishment, so in the same manner distance of time does not forbid the reception of evidence respecting the rights of the individual, because it is apparent that the evidences speak truly; and the same reason holds in such punishments as are purely a right of God.—The argument of our doctors is that a witness in a penal cause has two things at his option, both equally laudable; the *first*, evidence to an offence committed against the laws;—the *second*, the veiling and concealment of infirmity:—now if it be admitted that the delay in giving in the evidence arose from the charitable motive last mentioned, it follows that any subsequent evidence could only arise from motives of malice, or of private interest, exciting the witness thereto, in which case the witness incurs a suspicion destructive of the validity of his evidence: if, on the other hand, the delay should not have arisen from a wish to cover infirmity, the person giving evidence after such delay must be held unworthy of attention, as having for so long a time neglected that which was incumbent upon him, namely, *the giving of evidence*:—from all which it follows that, after such a lapse of time as amounts to *Takádim*, the witnesses are clearly liable to suspicion, either from their *falsity*, or their *unworthiness*; and this suspicion impugns the credibility of their testimony. This case is contrary to a case of *confession*, as men do not bear malice against *themselves*; and punishment for whoredom, or wine-drinking, or theft, are purely a right of God, whence the retraction of a person who makes a confession inducing such punishments is approved; and for this reason, distance of time in those instances forbids the reception of evidence: but punishment for slander is a right of the individual, as by it the scandal is removed from the person accused by the slanderer;

slanderer; (whence the retraction of a person acknowledging his having slandered another is not admitted;)—and distance of time, in a case which regards the rights of the individual, does not impugn the credibility of the evidence, as the witnesses here do not fall under any suspicion of sinister motives from delay in their testimony, since the claim of the plaintiff is conditional to the admission of evidence concerning the rights of the individual, and therefore their delay in giving evidence is to be attributed to the plaintiff not having called for it. All this is contrary to a case of punishment for *theft*, in which the evidence of witnesses is invalidated by delay, because the witnesses, by their delay in bearing testimony, become subject to suspicion of sinister motives, as here the claim is not a condition of punishment, since the punishment is purely a right of God, the claim being a condition only in matters of property; and also, because theft is chiefly committed during the night, at a time when the owner of the property is asleep and unwatchful, wherefore it is incumbent upon the witnesses to apprise the proprietor of the theft, and to bear testimony to it; but as, in a case of distance of time, or *Takâdim*, they have not so borne evidence, they become criminal and unworthy of credit from their neglect.

TAKÂDIM, or *distance of time*. as it prohibits the admission of evidence in the first instance, so it prohibits (according to our doctors) the infliction of punishment after the decree of the *Kâzee*: if, therefore, the convicted person were to abscond, after having received a part of his punishment, and, after the lapse of a period sufficient to constitute *Takâdim*, be taken and brought back, the remainder of the correction cannot then be inflicted upon him,—because the infliction of the *whole* punishment is included in the *Kâzee's* decree; and a part of it stands in the same predicament with the whole; and as the *Kâzee*, because of distance of time, could not decree punishment, so neither can he, in the same circumstance, decree the infliction of the *remainder* of the punishment.

Delay also prevents punishment, after the Kâzee's decree of it.

THERE

Limitation of
the delay in
question.

THERE are various opinions among the learned respecting the limitation of the *Takádim*, or *distance of time*, now under consideration. In the *Yama Sagbeer* the limitation of it appears to be *six months*; and the same is mentioned by *Tabávee*. *Haneefa* does not prescribe any limitation, but leaves it to the discretion of the magistrate, to be determined according to the customs of each respective age or country. It is recorded from *Mohammed* that he fixed the limitation of it to *one month*, as any less space of time falls within the description of *Ajil**; (and there is a record from *Haneefa* and *Abou Yoofof* to the same effect;) and this last is the most approved doctrine, where the witnesses are not at the distance of a month's journey from the *Kázee*; but where there is a distance of a month's journey between them, their testimony must be credited, because there appears on this occasion an obstruction to their giving evidence, namely, their distance from the *Kázee*; and hence they are not in such a case liable to suspicion. The limitation of *Takádim*, in respect to the punishment of *wine-drinking*, is also the same, according to *Mohammed*. According to the two *Elders* the limitation of it is confined to the going off of the smell of the liquor, as shall be hereafter demonstrated.

The evidence
of the wit-
nesses is valid
against one of
the parties, al-
though the
others be ab-
sent;

IF witnesses bear evidence against a person “that he has committed whoredom with a certain woman,” and the woman be absent, yet punishment must be inflicted on the man: but if witnesses bear evidence against a man that he has committed theft, and the owner of the property stolen be absent, the hand of the accused cannot be cut off. The difference between these two cases is that in *theft* the previous claim of the plaintiff is a necessary condition to the admission of evidence, but not in *whoredom*;—and the owner of the property stolen being absent, no claim can be instituted.

* By *Ajil* is meant a space of time so short as not to admit of its taking the description of *delay*.—Thus the payment of a debt is termed *Medjil* [prompt] where it takes place at any time within a month after it is due.

OBJECTION.—It would appear that, in the case of whoredom also, punishment ought not to be inflicted on the man, because it is possible that if the woman were present she might advance some plea productive of a demur.

REPLY.—This is a conclusion founded on mere conjecture, and therefore of no weight.

IF witnesses give evidence against a man “that he has committed whoredom with a woman whom they do not know,” punishment is not to be inflicted upon the man, because it is possible that the woman may be his wife, or his slave, and this, with respect to a *Mussulman* is most probable. But if a man make confession that “he has committed whoredom with a woman unknown,” punishment must be inflicted on him, since, if the woman with whom he committed the fact had been either his wife or his slave, she could not have been unknown to him.

unless the
other be
known.

IF two witnesses give evidence against a man, that “he has committed whoredom with such a woman, and forced her there-
“to,” and two other witnesses give evidence to the same fact, but with this variation, that “the woman was consenting,”—In this case, (according to *Haneefa* and *Ziffer*) punishment drops with respect to both the parties; and such also is the opinion of *Sbafai*—The two disciples say that punishment is in this case to be inflicted on the *man* alone; because the varying witnesses do yet agree in this that the man has committed whoredom, which is the occasion of punishment to him; for the only difference between the witnesses is that one party of them testifies to an additional offence, (namely, his having *forced* the woman,) which does not occasion the remission of punishment with respect to him: contrary to the case of a *woman*, with respect to whom punishment drops, because her consent is the condition on which her being liable to punishment depends, and this consent is not proved, because of the contradiction among the witnesses.

Case of a con-
tradiction in
the evidence.

nesses. The arguments of *Haneefa* on this point are twofold;—**FIRST**, the evidence is contradictory with respect to the *man*, because whoredom is *one act*, committed by *two persons*, the *man* and the *woman*,—and as the evidence is contradictory with respect to the *woman*, it must be held so with regard to the *man* likewise;—**SECONDLY**, the two witnesses who bore testimony to the consent of the woman are *slanderers*, and consequently their testimony is unworthy of any credit.

OBJECTION.—From this it would appear that punishment for slander is incurred by them, whereas it is not so.

REPLY.—Punishment for slander cannot be inflicted on them, on account of the evidence of the other two witnesses, who have deposed to force having been used by the man; for the woman can no longer be considered as *married*, in the sense which induces punishment for slander, since the description of *married* (in this sense) is not applicable to a woman after she has been enjoyed *unlawfully*, although she be *forced*.

Contradiction among the witnesses, in regard to the place, prevents punishment.

If two witnesses bear evidence against a man, that “he has committed whoredom with such a woman in *Koofa*,” and two others, “that he had committed such whoredom with that woman in *Bafra*,” in this case punishment drops with respect to both the man and the woman, because the circumstance alleged is the act of whoredom, and that is contradicted by the contradiction with respect to the place. The evidence to the fact is here in both instances defective, but yet the witnesses are not liable to punishment for slander, because of a demur, as the fact of *whoredom*, to which they bear testimony, is *one single whoredom* with respect to the perpetration of it, since the whore-monger is the same person, and the whore is also the same person, in the evidence of the contradictory witnesses on both sides, and there is no difference except with respect to the place in which the fact was committed. But if witnesses contradict each other, by two persons bearing evidence that such a man has committed whoredom with

with such a woman in such a spot of such a house, and by two other persons giving evidence that the man had committed the whoredom with that woman in another spot of the house, in this case punishment is to be inflicted upon that man. This is upon a favourable construction *. Analogy would suggest that punishment is not incurred, since there is also in this case a positive contradiction with respect to the place in which the fact was committed. But the reason for a more favourable construction is that a coincidence between the testimonies may be conceived, by supposing the act to have been begun in *one* corner of the house, and completed in *another* corner, in consequence of the motions of the parties; and it is also possible that the act may have been committed in the *middle* of the house, and a person seeing it from the front may conceive it to be performed in the *forepart* of the house, and another viewing it from the back part may conceive it to be performed in the *back part* of the house; and each bears evidence according to his own conception.

If four witnesses bear evidence against a man "that he has been guilty of whoredom with such a woman at sun-rise in *Hind*," (a place near *Koofa*, which is also called *the place of Abdal-Ribmān*,) and four other witnesses give evidence against the man that "he has been guilty of whoredom with such a woman at sunrise, in *Noekhla*," (which is also a place near *Koofa*,) in this case neither the man nor the woman are liable to punishment for whoredom, nor are their accusers liable to punishment for slander. The accused are not liable to punishment for whoredom, because the testimony of the contradicting witnesses must, on one part, be *false*, although it be impossible to ascertain on which side of the evidence the falsehood lies: and the accusers are not liable to punishment for *slander*, because it is possible that the evidence on one side may be true; and as this possibility applies equally to both parties, punishment for slander cannot be inflicted upon either.

Evidence, agreeing in point of time, but contradictory in point of place, does not occasion punishment.

* That is to say, with respect to the witnesses; for if the evidence be not sufficient to subject the parties to punishment, the witnesses are liable to punishment for *slander*.

Evidence
against a wo-
man who is
afterwards
proved to be
a *virgin* is
void.

If four witnesses bear testimony against a woman, that “ she has committed whoredom with such a man,”—and it should appear, upon examination made by females employed for that purpose, that the woman is still a *virgin*, in such case neither of the persons thus accused are liable to punishment for whoredom: nor are the accusers liable to punishment for slander, because the evidence of the females employed to examine the woman accused is a proof which suffices to prevent the infliction of punishment for whoredom upon the parties accused; but it is not a proof sufficient to subject the accusers to punishment for slander*: punishment for whoredom, therefore, is not inflicted on the accused; nor are the accusers liable to punishment for slander.

Incompetent
witnesses, by
bearing testi-
mony to
whoredom,
incur punish-
ment for
slander.

If four witnesses give evidence against a man that “ he has committed whoredom with such a woman,” and it should happen that these witnesses are *blind*, or have ever been punished for slander; or that one of them is a slave, or has been punished for slander; in this case the witnesses are all liable to punishment for slander; but the accused does not incur punishment for whoredom; because, as a matter of *property* cannot be determined by the evidence of such witnesses, it is impossible that *punishment* should be established by it; and the witnesses, where they are all blind, or have all before suffered punishment for slander, are incapable of bearing evidence; and where one of them is a slave, he is totally incapable of bearing evidence; and so also of one of them who has before suffered punishment for slander:—by their evidence, therefore, even a *doubtful* whoredom is not established; and hence their testimony becomes converted into *slander*; wherefore they are *slanderers*, and punishment for slander is consequently incurred upon them.

The evidence
of *reprobate*

If four witnesses bear evidence to whoredom at a time when they

* Because it is, notwithstanding, possible that the act may have been performed upon the woman, although not to such a degree as to destroy the appearances of virginity.

are reprobate *, or if this character should be affixed upon them by competent proof after they have given evidence, they are not liable to punishment for slander; because, although the evidence of a reprobate person be defective, from his veracity being liable to suspicion on account of the badness of his character, yet he is a competent witness, insomuch that if a *Kāzee* issue a decree upon the evidence of a reprobate person, his decree is valid, according to our doctors. The evidence of reprobate persons, therefore, goes to establish a *doubtful* whoredom, and they are consequently not exposed to punishment for slander; and since, moreover, from the defect in their testimony, on account of their being reprobate, a doubt appears that whoredom has *not* been committed, the accused are therefore not liable to punishment for whoredom. *Shafai* dissents from our opinion concerning this case, as he holds a reprobate person to be incapable of being an evidence, and consequently, that he stands in the same predicament as a *slave*.

persons is neither attended with punishment for whoredom to the *accused*, nor with punishment for slander to the *accuser*.

If *fewer* than four persons bear evidence to whoredom, punishment for slander is applicable to them:—this effect is induced, because, although their testimony be good, yet testimony to whoredom is so accounted only where it amounts to *evidence*; and the testimony of fewer than four persons, in a case of whoredom, is not evidence, so as to be accounted *good*; wherefore it is *slanuer*.

Witnesses defective in point of number incur punishment for slander:

If four persons bear evidence against a man, that “ he has been “ guilty of whoredom,” and the *Kāzee* should inflict punishment for whoredom upon the parties accordingly, and it should afterwards appear that one of the witnesses is a *slave*, or has at any time been punished for slander, punishment is incurred by *all* the witnesses, as the witnesses are on this occasion only *three* in number. Observe however, that in this case no *Arisb*, or *fine of damage*, is due on account

and so also of the *comp* *plus* number of witnesses. where one of them afterwards proves *incompetent*; but no fine is due in this case, except

* Arab. *Fāsi*. It is elsewhere rendered *unjust*; but the term here adopted approaches, perhaps, nearer to the real meaning. *Fāsi* signifies a person who neglects decorum in his *dress* and *behaviour*, and whose evidence, therefore, is not held to be admissible.

the accused
suffer lapida-
tion, when a
deyit is due
from the pub-
lick treasury.

of such flagellation, either from the witnesses, or from the public treasury: but if, in consequence of the evidence, the person accused should have been stoned to death by a sentence of lapidation, the *Deyit*, or fine of blood, is due from the publick treasury. This is the doctrine of *Haneefa*. The two disciples say that the fine of damage is also due from the publick treasury in the former case. The compiler of the *Hedaya* remarks that this difference of opinion obtains where the accused happens to be *cut* by the stripes he has received. The two disciples also hold that if the accused should chance to *die* in consequence of the correction by scourging, the fine of blood is due from the publick treasury;—in opposition to *Haneefa*;—and likewise, that if the witnesses should retract from their evidence after the accused has been cut by scourging, or died in consequence thereof, they [the witnesses] become responsible for the fine of damage in the *first* instance, or the fine of blood in the *second*. The argument of the two disciples is that, in consequence of the testimony of the witnesses, stripes are to be inflicted *generally**, whether they be of a *cutting* nature or otherwise, since to avoid cutting is not always in the executioner's power; the scourging, therefore, which is due in consequence of the testimony of the witnesses, comprehends both *cutting* stripes, and also stripes which do *not* cut, and consequently the cutting is to be referred to the testimony of the evidences, whence they are responsible for the same, where they retract from their testimony. But where the witnesses do not retract, (that is where their evidence is set at nought, not by *retraction*, but by one of them being afterwards discovered to be *incompetent*,) the fine of blood is due from the publick treasury, because the act of the executioner is to be referred to the *Kāzee*, and the *Kāzee* acts on behalf of the community of *Mussulmans*, wherefore the atonement for the act falls upon that which is the property of all the *Mussulmans*, namely, the publick treasury, in the same manner as in a case of *wounds*, or *retaliation*. The argument of *Haneefa* is that as nothing is due in consequence of the testi-

* That is, not restricted to any particular description of stripes.

mony of the witnesses, further than *punishment*, (by which is understood such a scourging as excites pain, but such as evidently cannot prove destructive, except through the fault of the flagellator, proceeding from his carelessness or incapacity,) the cutting, therefore, is to be referred to *him alone*, and not to the *testimony of the witnesses*: but yet (according to the *Rawhyet-Sabseh*) the scourger is not made responsible, lest men should be deterred from the infliction of punishment, by an apprehension of being made answerable for the consequences of it.

If four witnesses bear testimony to an evidence given by four *other* witnesses, against a man, of his having committed whoredom, punishment is not to be inflicted upon the person so accused, because evidence in support of evidence introduces an increase of doubt, since wherever, in the recital of a fact, the channels of communication are multiplied, the doubt of it's truth increases in proportion; and there is in this case no necessity for considering the *secondary* witnesses in the light of *original* witnesses. And if the four original witnesses should afterwards come and bear testimony of themselves to the whoredom, in the place where the secondary witnesses had before given their evidence, here also no punishment is to be inflicted on the accused, because their testimony has already been rejected in *one* shape, in consequence of the rejection of the testimony of the secondary witnesses, respecting the same fact, as the secondary witnesses are the substitutes of the primary witnesses, from the circumstance of those having directed them, and thrown the matter upon them. But here punishment for slander is not to be inflicted on either the original or the secondary witnesses, because both are complete in point of *number*, although punishment for whoredom be not inflicted, on account of a *doubt*, which is such as suffices in bar of punishment for whoredom, but is not sufficient to subject the witnesses to punishment for slander.

The testimony of secondary witnesses invalidates that of primary witnesses.

One of four witnesses retracting, after lapidation upon the accused, incurs punishment for slander, and is responsible for one-fourth of the fine of blood:

If four witnesses give evidence against a man, that he has committed whoredom, and he suffer lapidation, and one of the witnesses afterwards retract, punishment for slander is to be inflicted upon him alone, and he is also responsible for one-fourth of the fine of blood. The reason for *one-fourth* only of the fine of blood being due from him is that *three-fourths* of the veracity of the evidence remain, in consequence of the evidence of the three remaining witnesses still continuing; by the evidence, therefore, of the witness who retracts, only *one-fourth* of the veracity is affected.—(*Shaf'ei* says that the *death* of the retracting witness is incurred, and not a fine upon his *property*, according to his tenets concerning witnesses in retaliation, as shall be hereafter shewn in treating of *Deyit*.)—That punishment for slander is incurred by the witness is the opinion of our three doctors. *Ziffer* says that punishment for slander is not due, because, if the slanderer be considered as the slanderer of a *living* person, his slander is rendered void by the *death* of that person; or, if he be considered as the slanderer of a *defunct*, the said defunct has suffered lapidation under a sentence of the *Kāzee*, whence originates a demur respecting the propriety of punishment for *slander*. The argument of our doctors is that evidence to whoredom does not become slander, in consequence of retraction, on any other account than as the evidence is thereby cancelled; the evidence, therefore, at the time of retraction, is rendered *slander* with respect to the *dead*; and a person who slanders a married person defunct is liable to punishment for slander. With respect to what *Ziffer* advances, (that the defunct has suffered lapidation under a sentence of the *Kāzee*, which gives rise to a demur respecting the propriety of punishment for slander,) we reply, that upon the evidence, which is the proof, being cancelled by retraction, the decree of the *Kāzee*, sentencing lapidation, does not give rise to any demur in bar of punishment for slander; wherefore punishment for slander is to be inflicted upon him who retracts from his testimony: contrary to what would be the case if any *other* than the retracting person were to slander him who had suffered lapidation, as the latter

is not a *Mahsan* in respect to any other person, since the sentence of the *Kāzee* against the deceased is, with regard to that *other*, *proper* and *just*.—What is now advanced regards a case where one of the witnesses retracts, *after* lapidation: but if one of them were to retract *before* the execution of lapidation, after sentence has been passed by the *Kāzee*, in this case punishment for slander is to be inflicted on all the witnesses; and the punishment of the accused is remitted. This is the doctrine of the two *Elders*. *Mohammed* says that, in this case also, punishment for slander is to be inflicted on the retracting witness alone, because the evidence of the witnesses has been corroborated by the *Kāzee*'s sentence, and therefore is not cancelled except with respect to the *retractor* alone,—in the same manner as where the witness retracts after the execution of the sentence.—The argument of the two *Elders* is, that the infliction of punishment is only a supplement to the sentence of the *Kāzee*; the retraction in the present instance therefore, is the same in effect, as if one of the witnesses were to retract before the sentence had been passed; (for which reason punishment drops with respect to the accused;) and if one of the witnesses were to retract previous to the *Kāzee*'s sentence of lapidation, punishment for slander would be inflicted upon all of them. *Ziffer* says that in this case also punishment for slander would be inflicted on the retracting witness alone, because his retraction is not of account with regard to any except himself. The argument of our doctors is that the declaration of the witnesses is radically *slander*, and does not become *evidence* until it be so rendered by a sentence of the *Kāzee*, passed in conformity to it; and where this sentence has not been passed, such declaration continues to be slander, as it radically was; wherefore punishment for slander is to be inflicted upon all of them.

but if he retract *before* lapidation, all the witnesses are liable to punishment:

If *five* persons bear evidence [to whoredom,] and one of the five retract after lapidation, no penalty whatsoever is incurred by the witness so retracting,—because, *four* witnesses still remaining, the evidence

One of *five* witnesses, retracting, does not incur either punishment or fine.

evidence remains complete. But if, afterwards, one of the remaining four witnesses should retract, punishment for slander is then due upon both retractors, and each is indebted in one-fourth of the fine of blood. Punishment for slander is due upon them, because evidence to whoredom is rendered slander by subsequent retraction, as before explained; and they are each indebted one-fourth of the fine of blood, because, by the three persevering witnesses still remaining, three-fourths of the validity of the body of evidence continues unimpeached, as the perseverance of those who *remain* is regarded, and not the retraction of those who *draw-back*, (according to what is said upon that head in its proper place;) and as only one *fourth* of the veracity is destroyed by the retraction of these two witnesses, it follows that they remain responsible for *one fourth* only of the fine of blood.

Where *justified* witnesses prove afterwards defective, the fine of blood is due from the *purgators* of these witnesses.

If four witnesses give evidence of whoredom against a man, and these witnesses be justified by *Taxkecat**, and the accused suffer lapidation, and it should afterwards appear that those witnesses were *idolaters*, or *slaves*, (by the purgators retracting their evidence of justification, and declaring them to be *slaves*, or *idolaters*,) in this case the fine of blood is due from the purgators, according to *Hanoefa*. The two disciples say that in this case the fine of blood falls upon the public treasury. Some hold that this difference exists only where the purgators, in their retraction, declare that their justification of the witnesses had been according to the best of their knowledge and belief at that time. The argument of the two disciples is that the purgators have done nothing more than merely speaking in commendation of the witnesses, in the same manner as if they were to speak in commendation of the *accused*, by testifying to his being within the

* That is, by a certain number of other witnesses bearing testimony to the competency, &c. of witnesses who are giving evidence in any cause, the former being denominated the *Moz-tu*, or purgators; the nature of this mode of justification is exhibited at large in treating of *Evidence*.

description

description of *Ibfân**, in which case nothing is due from them, and so here likewise. The argument of *Haneefa* is, that testimony of the witnesses is not proof, nor worthy of any regard, but through the justification of the purgators; wherefore the justification is, in reality, the efficient cause of the sentence; whence the sentence must be referred and attributed thereto: contrary to their bearing testimony to the *Ibfân* of the accused, as that state is conditional to a person being considered a *Mahsan*,—that is, *married*, under such circumstances as (in case of whoredom) subject him to lapidation. It is also to be remarked that, whether the before-mentioned justifier should pronounce the justification in the proper and formal terms of evidence,—(thus, “*We testify that these witnesses are freemen and believers*”) or not in the formal terms of evidence,—(as thus,—“*These are freemen and believers,*”) the effect is in both cases the same, and there is no difference whatever between them; this, however, holds only where the purgators restrict their justification to the *freedom* or *faith* of the evidences, as above; but if they should say, “these witnesses are “*âdils*”†, and it should afterwards appear that they are *slaves*, in this case the purgators are not responsible for the fine of blood; because *slaves* are, in some instances, of the description of *âdils*:—neither are the witnesses, in this case, responsible for the fine of blood, as their declaration does not amount to *evidence*‡; nor are they subject to punishment for slander, because their accusation was made against a *living* person, but that person is now dead, and his heirs cannot procure punishment for slander to be inflicted on them, as it is not inheritable. If the purgators persevere in their justification, or have unknowingly borne testimony therein, and it should

* That is, by testifying that the accused is *married*, under such circumstances of *freedom*, and so forth, as (in case of whoredom) subjects a person to lapidation.

† Persons of respectable character, in opposition to *reprobatus*.

‡ Because they afterwards appear (from the retraction of the purgators) to be incompetent evidences.

afterwards appear that the witnesses are of an *incompetent* description, nothing whatever falls on the purgators:—but in this case the *fine of blood* falls upon the *public treasury*.

Case in which
the fine of
blood falls
upon the
slayer.

If four persons bear testimony of whoredom against a man, and the *Kázee* sentence him to be stoned, and any person should slay him, and it should afterwards appear that the above witnesses were incompetent, in such case, the *fine of blood* falls upon the slayer, according to a favourable construction of the law.—Analogy would suggest, in this case, that *retaliation* is incurred, as the slayer has killed an innocent person without cause: but the reasons for a more favourable construction of the law are twofold; **FIRST**, The *Kázee's* sentence of lapidation was, in appearance, regular and valid, at the period of slaying, and hence was established an erroneous admissibility of slaughter: contrary to a case in which the accused is slain before the *Kázee* issues his decree of lapidation, as the testimony of the witness is not proof until then:—**SECONDLY**, The slayer has acted under a conception that the slaying of that man become allowable, he having a confidence in the argument of such permission, namely, the *Kázee's* sentence of lapidation; and hence it is the same as where a person slays another, supposing him, from former circumstances, to be an enemy, in which case the fine of blood is incumbent upon that person, and so here likewise.—It is to be observed that the fine of blood thus incurred is a charge upon the *estate* of the slayer, and does not fall upon his *tribe*, because it is *wilful homicide*, for which the tribe is not responsible: and this fine of blood must be discharged within three years, [after the perpetration of the fact,] as being due on account of *homicide*. But if *no* person were in this manner to slay the accused, and he suffer lapidation by the sentence of the *Kázee*, and it should afterwards appear that the witnesses were incompetent,—the fine of blood in this case falls upon the public treasury, because the persons who stone the accused act in conformity with the order of the *Kázee*, and hence their act must be referred to the *Kázee*; and as, if the

the *Kâzee* were to execute the sentence upon the accused *with his own hands*, the fine of blood would fall upon the public treasury, so also it falls upon the same, where any other person executes such sentence under the *Kâzee*'s authority. This case is evidently contrary to one where the *Kâzee* passes a sentence of lapidation, and another person slays the accused in a different manner, and not by *stoning*; for in so doing he has not acted in conformity to the order of the magistrate.

If witnesses bear evidence of whoredom against a man, declaring that "they had come to the knowledge of it by wilfully looking into "the person's private apartment at the time of the fact," yet such evidence is to be credited, nor is it to be rejected on account of the manner in which the knowledge of the witnesses was obtained, as their looking was allowable, in order that they might be enabled to bear evidence; they are therefore the same as *physicians* or *midwives* *.

Evidence to whoredom is valid, although the knowledge of the fact be unlawfully obtained.

If four witnesses bear evidence of whoredom against a man, and the accused should plead that "he is not a *married* man," and it should happen that he has a wife who has brought forth a child to him,—(in other words, should deny the consummation of his marriage, after the establishment of all the conditions of it,) he is to be stoned, because the effect of the establishment of the child's parentage † is a consequence of his having had carnal communication with his wife, (whence it is that if he were to pronounce a divorce upon her, a divorce reversible takes place;)—and his being a *married man* is established, on account of the aforesaid effect: and if

The accused's plea of celibacy, if unfounded, does not prevent lapidation.

* To explain this it may be proper to remark that a person's looking into the private apartment of another is an *unlawful act*, which, if it was not justified by the *motive*, would invalidate his testimony.

† Established in him in virtue of his marriage.

the wife should *not* have borne a child, yet if one man and two women, as witnesses, bear testimony to the marriage of the accused, in this case lapidation is to be inflicted upon him. *Shaf'ei* says that the accused, in this case, does not suffer lapidation; and this his opinion is founded on his doctrine in the laws of evidence, that "the testimony of women is not admissible, excepting in cases of *property*."—*Ziffer* remarks that the circumstance of the accused being a *married man*, although it appear to be only the *condition* of the sentence, yet is in reality the *cause*, as rendering the offence more atrocious; wherefore the sentence must be referred to that circumstance; and this condition being, in reality, the *occasion* thereof, the evidence of women cannot be admitted in it, any more than with respect to the original offence, namely, the *whoredom*. Thus it is the same as where two infidel subjects of the *Mussulman* government testify concerning a *Mussulman* slave, who has committed whoredom, that "his master had emancipated him before the perpetration of the fact," which testimony would not be admitted, because the *Ibsân* of the slave [that is, his being a *free married man*] is so far a *condition* of the sentence as to be, in reality, a *cause* of it. The argument of our doctors is that marriage in a state of freedom is an *honourable* state, and is repugnant to the commission of whoredom, (as was already stated,) wherefore this circumstance cannot be, in *reality*, a cause of the sentence. The testimony, therefore, of the witnesses to the *Ibsân* of the accused is the same as their testimony in any other case than whoredom; and as their testimony to his *Ibsân* would in other cases be credited, so also in a case of *whoredom*: contrary to the case of the two infidel subjects and the slave, as cited by *Ziffer*, because there the freedom of the slave is proved by the testimony of those two witnesses: but it is not thereby proved that the date of the slave's freedom was antecedent to the commission of whoredom, either because a *Mussulman* denies such date,—or because that circumstance would be injurious to a *Mussulman*. If the witnesses who testify to *Ibsân* retract, yet they are not responsible for the fine of blood: contrary to the doctrine of *Ziffer*, according to what was before observed.

CHAP. IV.

Of *Hidd Shirrub*, or the *Punishment* for drinking *Wine*.

IF a *Mussulman* drink wine, and be seized whilst his breath yet smells of the wine, or be brought before the *Kázee* whilst he is yet intoxicated therewith, and witnesses give evidence, that “ he has drunk “ wine,” punishment for wine-drinking is to be inflicted upon him ; and in the same manner, punishment is incurred by him when he makes confession of having drunk wine, whilst his breath yet retains the smell ; because the offence of wine-drinking is proved upon him, and *Takúdim*, or *distance of time**, does not appear, since the flavour of the wine still remains. This doctrine is originally founded upon a precept of the prophet, “ *Whoever drinks of wine, let him suffer correction by “ scourging, as often as he drinks thereof.*”

General rule.

IF a man make confession of having drunk wine, after the smell has ceased, in this case punishment is not to be inflicted upon him, according to the two *Elders*. *Imám Mohammed* maintains that it is to be inflicted. The same difference of opinion obtains in a case where witnesses bear evidence against a man that “ he has drunk wine” after the smell has ceased. The reason of this diversity of opinion is that *Takúdim*, or lapse of time, forbids the reception of evidence in a case of wine-drinking, according to all the doctors : but *Mohammed* fixes the limitation of *Takúdim*, in wine-drinking, to a certain time, namely, *one month*, (according to the most approved authorities,) he conceiving an analogy between this, and a case of *whoredom*, because delay is established by *lapse of time*, and not by the *ceasing of a smell* ; and

Punishment is not inflicted in a case of confession, or accusation, made after the smell is gone off ;

* See the preceding Chapter ; p. 35.

the existence or *non*-existence of a smell is of no weight, as there are other things the flavour of which resembles that of wine. According to the two *Elders*, on the contrary, *Takâdim* is established by the nonexistence or departure of the smell, for two reasons;—FIRST, a decree of *Abdoola Ibn Massâod*, who, when certain persons brought before him a man charged with drinking wine, directed that “they should examine his breath, and that, if any flavour of wine were discovered, punishment should then be inflicted upon him;” SECONDLY, the existence of the effect, (namely the *smell*,) is an irrefragable proof of wine having been lately drank. And as to what *Mohammed* advances, that “there are other things the flavour of which resembles that of wine,” it may be replied that the difference between the smell of wine, and other articles, may be easily distinguished by one who is possessed of judgment and discernment, nor can any but ignorant persons be doubtful concerning it. Thus, according to *Mohammed*, CONFESSION of wine-drinking is not rendered ineffectual by distance of time, in the same manner as (according to him) confession of *whoredom* is not rendered ineffectual by distance of time, agreeably to what was before advanced:—with the two *Elders*, on the contrary,—punishment for wine-drinking is not to be inflicted but on the condition that the smell still remain, because *Ibn Massâod* stipulated that condition, as before stated.

unless this be
owing to an
unavoidable
delay in
bringing the
accused to the
seat of justice.

IF witnesses seize a drinker of wine * at a time when he is intoxicated, or whilst he still retains the smell of the liquor, and carry him to a city where there is a *Kâzee*, and in the mean time the flavour or the intoxication should cease, before they arrive at the seat of justice, yet in this case punishment for wine-drinking is to be inflicted upon that person, according to all our doctors, because there is an excuse for the delay, analogous to that which is created by distance

* This case supposes his being seized in some remote place, at a distance from the seat of justice.

of place in a charge of *whoredom*; and the witnesses are not suspected where such excuse exists.

If a person be intoxicated by drinking *Nabbeez**, punishment is incurred by him, because it is related of *Omer* that he decreed punishment for wine-drinking upon a wild *Arab*, who was intoxicated by drinking that liquor.—(The punishment for drunkenness, and the degree of scourging in the punishment for wine-drinking, shall be hereafter explained.)

Punishment is incurred by drinking *Nabbeez*.

If the smell of wine be discovered upon a person, or he should vomit wine, yet if witnesses have not actually *seen* him *drinking* it, punishment is not incurred, because the smell alone leads but to a very uncertain conclusion, as this appearance may proceed either from the person having drank wine, or from his having sat among wine-drinkers, from whom he may have contracted the smell;—and it is also possible that wine may have been administered to him by *force*, or *menaces*, in which case no punishment is incurred.

The *smell* alone does not suffice for conviction, without *evidence*:

PUNISHMENT for wine-drinking is not incurred by intoxication alone, unless it be known that the person has been intoxicated by the voluntary drinking of *wine*, or of *Nabbeez*, because men are sometimes inebriated by the use of articles which are permitted, such as the juice of *Henbane*, or *mare's milk*; and men may also be sometimes *compelled* to drink wine, which is not a punishable offence, when thus committed by *compulsion*.

nor *intoxication*, unless it be known to proceed from *wine*.

PUNISHMENT is not to be inflicted upon a wine-drinker, whilst he is intoxicated, nor until his intoxication shall have ceased, in order that the end thereof (namely *determent*) may be obtained.

Punishment not to be inflicted during *intoxication*.

* A fermented liquor made by steeping *dates*, *raisins*, &c. in hot water. It is described particularly in another place.

Punishment
for wine-
drinking to a
free person is
eighty stripes.

THE punishment of a free person, for drinking wine or other intoxicating liquor, is *eighty stripes*, on the authority of all the companions; and those eighty stripes are to be inflicted in every respect under the same rules and restrictions as in the case of whoredom, according to what is mentioned under that head: and (according to the *Rawdyet Mashboor*,) the wine-drinker must be stripped naked to receive his punishment. It is recorded from *Mabommed* that the offender must *not* be stripped, as nothing concerning the punishment for wine-drinking occurs in the sacred writings, wherefore it is expedient, for the sake of lenity, that a wine-drinker be not stripped to receive correction. The reason for what is recorded in the *Rawdyet Mashboor* is that *one* kind of lenity is already shewn in the number of stripes prescribed, those in whoredom being *one hundred*, whereas in wine-drinking there are only *eighty*; hence it is not requisite that a *second* sort of lenity be shewn in *the mode* of infliction.

and, to a
slave, forty
stripes.

IF the drinker of wine be a slave, male or female, the punishment for wine-drinking, with respect to such, is *forty* stripes only, because the state of bondage induces only *half* punishment, as has been repeatedly mentioned.

Confession
may be re-
tracted.

IF a person make confession to the drinking of wine, or any other intoxicating liquor, and afterwards retract from such confession, punishment is not to be inflicted upon him, as the punishment of wine-drinking is purely a right of God.

The offence is
proved by *two*
witnesses, or,
by *one* con-
fession.

WINE-DRINKING is proved on the testimony of two witnesses; and also by confession once made. It is recorded from *Abou Toofaf*, that *two* confessions are requisite. But it is to be observed that the evidence of women against men is not admissible in wine-drinking, because the evidence of females is liable to variation, and they may be also suspected of absence of mind, or forgetfulness.

THE degree of intoxication which occasions punishment amounts to this,—that the person so intoxicated be not able to distinguish what is said to him in any shape ;—nor to know a *man* from a *woman*. The compiler of the *Hedaya* observes that this is the doctrine of *Haneefa*. The two disciples have said that the degree of drunkenness which induces punishment is sufficiently found in the intoxicated person speaking confusedly and indistinctly, as it is from this that drunkenness is generally understood. Many doctors agree with the two disciples in this point. The argument of *Haneefa* is that the drinking of wine is among the causes of punishment, wherefore it is to be noticed only in the *excess* ; for in acts which are causes of punishment the *excess* of them only is regarded, on account of seeking a pretext for the purpose of averting punishment ; and *excess* of drunkenness appears in the intoxication so far overpowering the reason as not to leave the person a capacity of distinguishing one object from another.—(In ascertaining the illegality of intoxication produced by drinking any other liquor than wine, regard is had to what the two disciples maintain concerning the punishment for drunkenness produced by *wine*-drinking.)—*Shafei*, in the punishment for drunkenness, has regard to the appearance of the effect produced by the wine, in the intoxicated person's *walking*, or other actions, by his *flaggering* or *turning giddy* when he attempts to walk ; but our doctors say that such effect may proceed from different causes, as they sometimes do not attend drunkenness, and sometimes occur in other cases, (such as *weakness* for instance,) wherefore this species of effect is not regarded.

Degree of intoxication required to induce punishment.

If a person, during a fit of intoxication, should make confession of any thing which occasions punishment, (such as *whoredom* for instance,) no punishment is to be inflicted upon him, as in such a confession, there is apprehension of falsehood, and this apprehension is to be regarded so far as to avert punishment, since punishment [*Hidd*] is purely a right of God :—it is otherwise, however, in punishment for

Confession of any offence, made during intoxication, is not regarded :

slander ; for if a man in a state of intoxication were to make confession of slander, punishment for slander must be decreed upon him, because this is not purely a right of God, but is also a right of the *individual*, and therefore a state of drunkenness is here the same as a state of sobriety, for the sake of inflicting a *penalty*, in the same manner as in all other matters, such as *divorce*, *manumission*, and so forth.

not apostasy.

If a man, during intoxication, should apostatize from the faith, his wife is not thereby divorced from him, because infidelity depends upon what may be a person's *belief*, and that cannot be ascertained during *drunkenness*.

CHAP. V.

Of *Hidd Kazaf*, or the *Punishment for Slander*.

Definition of *Kazaf*. KAZAF, in it's primitive sense, simply means *accusation*. By *Kazaf*, in the language of the law, is understood a man insinuating a charge of whoredom against a married man or woman ; the person so acting being termed the *Kāzif*, or *slanderer* ; and the man or woman so scandalized the *Makzūf*, or *slandered*.

Punishment for slander to be ordered by

If any person expressly accuse of whoredom a man or woman who is married *, in such case, if the accused require the magistrate

* Without producing the number of witnesses requisite to prove the charge.

to pass sentence of punishment for slander upon that person, the magistrate is bound to order its infliction. the magistrate.

THE punishment for slander is *eighty stripes*, if the slandered be *free*, because God has so commanded in the *Koran*, saying,—“ BUT “ AS TO THOSE WHO ACCUSE MARRIED PERSONS OF WHOREDOM, “ AND PRODUCE NOT FOUR WITNESSES, THEM SHALL YE SCOURGE “ WITH FOURSORE STRIPES.” And the conditions upon which this punishment is to be inflicted are twofold;—FIRST, That the accused make requisition thereof, because of his right being involved in it, in as much as scandal is by that means removed from him;—SECONDLY, That the accused be a married man, this being particularly specified in the text already quoted. The punishment, to a freeman, is eighty stripes.

It is necessary that the eighty stripes [or strokes] be inflicted on different parts [or limbs] of the offender, in conformity to what has been already advanced upon that subject with respect to the punishment for whoredom: but it is to be observed that the person suffering this correction is not to be stripped naked, because the occasion of the punishment is not absolutely certified, since it is possible that the accuser may have spoken truly, for which reason it must not be inflicted with *severity*, as in punishment for *whoredom*. The outer garment or robe, however, together with any clothes which are *stuffed* or *quilted*, must be removed, because such a covering would prevent a person from feeling his punishment.

If the accuser be a *slave*, the punishment for slander with respect to him is *forty stripes*; as bondage induces only half punishment,—according to what has been before repeatedly observed upon that head. and to a slave forty stripes.

THE *state of marriage* of the slandered person [which is a requisite condition of punishment to the *slanderer*] requires that Description of a person the slander-
he

ing of whom
induces pu-
nishment.

he or she be free, of sound judgment, of mature age, and a *Mussulman*; and also of chaste repute; that is to say,—free from any suspicion of adultery: there are, therefore, five conditions required in it; FIRST,—The *freedom of the accused*, because the word of God says, “UPON THEM,” (that is upon female slaves) “IS DUE HALF THE PUNISHMENT THAT IS DUE UPON *Mahsanas*,”—Where the word *Mahsanas*, by the context, implies *free women*, in opposition to *slaves*, whence it appears that the term *married* [*Mahsan*] here applies only to *free people*;—SECONDLY, *Sanity of intellect*, and, THIRDLY, *Maturity of age*,—because infants and idiots are not liable to be scandalized, as whoredom cannot be proved upon such;—FOURTHLY, *Islim*, because the prophet declared, “*A Polytheist is not a MAHSAN* :” and FIFTHLY,—*Chastity*, because no scandal attaches to any other persons than those who are of chaste repute, and the accuser of an unchaste person, moreover, speaks truly.

Cases which
constitute
slander.

If a person deny another's parentage, as if he were to say to him, “Thou art not the son of thy [reputed] father!” such person thereby incurs punishment for slander: this, however, is only where the mother of the person thus addressed is a *married woman*, because such denial is a positive accusation with respect to the mother of that person, since the legitimacy of a child cannot be denied unless it be begotten in whoredom.

If one person, in the heat of passion, say to another, “Thou art not the son of such-a-one,” and the person mentioned be his father, and his descent be established as from him, in this case the person so speaking incurs punishment for slander. But if these words be spoken in any other circumstance than the heat of passion, punishment for slander is not incurred by the speaker, because such words, if spoken in wrath, imply malicious and wanton abuse, whereas, if uttered in a calm and deliberate moment, they may mean no more than an upbraiding, by denying any likeness between the person spoken

spoken to and his father, in point of goodness of disposition, such as *benevolence* and so forth.

IF a man say to another; "Thou art not the son of such-a-one," and it should happen that the person named is the *grandfather* of him who is thus addressed, the speaker does not incur punishment for slander, because his assertion is literally true. And, in the same manner, if a man should declare another to be the son of one who is his *grandfather*, he does not thereby incur punishment for slander, because the child's child is metaphorically referred to the *grandfather*, and is called *his* child.

IF a man call another "a *son of a whore*," and it should happen that the mother of him who is thus addressed is dead, and had been a married woman, in such case, if he [the son] require punishment for slander to be inflicted upon the speaker, the same must be inflicted accordingly, because the speaker has slandered a married woman after her death. It is to be observed, however, that a right to demand punishment for slander, in behalf of a deceased person, belongs only to one in whose parentage a flaw is created by the imputation, and this is either the *parent* or the *child*, because scandal attaches to the child of the accused, and hence the slander applies to the child also in effect. According to *Sbafēi*, any heir may demand punishment for slander in behalf of a person deceased, because punishment for slander is held by him to be a matter of *inheritance*, as shall be hereafter demonstrated. According to our doctors, on the other hand, the power of demanding punishment for slander in behalf of a person deceased is not in the way of an *inheritance*, but for a reason already intimated, that the scandal arising from the slander attaches to the deceased;—whence it is that the right to demand punishment for slander on behalf of a defunct appertains to one who may be excluded from inheritance by the murder of the person from whom he inherits; and that it also appertains to the child of the *daughter*, in the same manner

Case of a
claim of pu-
nishment for
slandering a
defunct.

manner as to the child of the *son*, (contrary to the opinion of *Mohammed*;) and also, that it appertains to the *child's* child during the lifetime of the *former*, (contrary to the opinion of *Ziffer*;)—and so also, that if the deceased person who was slandered were *married*, it is lawful for that person's child to demand the punishment for slander, although such child should be an *infidel*, or a *slave*. This last is also contrary to the opinion of *Ziffer*, who argues that if the right of demanding punishment for slander, in behalf of a defunct, were to rest with the child, being an *infidel*, it must so appertain, either in the manner of an *inheritance*, or on account of his being a *party*, because of the slander extending to him *by effect*, (since the scandal arising from it attaches to him;) and both these inferences are unsupported; the *first*, because punishment for slander is not a matter of *inheritance*; and the *second*, because, as an express accusation of whoredom made against the child does not induce punishment for slander, (since an infidel cannot be a married person in the sense which subjects the accuser to punishment,) so, in a case where the slander is established with respect to him *by effect* only, it does not induce punishment *a fortiori*.—Our doctors, on the other hand, argue that, in the case in question, the slanderer, by accusing a married person, has fixed a stain upon the child, for which he will seek satisfaction by punishment for slander:—the principle upon which this proceeds is that the circumstance of the accused being a *married person* is made a condition [of punishment upon a slanderer] in order that, in the charge of whoredom, the imputation of a stain upon him may be completely established, after which such imputation of a stain descends to his child; and such is the case in the present instance: and although the child be an infidel, yet infidelity does not prevent a *claim of right*: contrary to a case where an express accusation is advanced against the *child himself*; for in this case punishment for slander is not incurred, because here the imputation of a stain does not completely exist, as *marriage* (in the sense which would induce punishment for slander,) does not exist with respect to the *accused*, on account of his being an *infidel*.

A SLAVE

A SLAVE is not permitted to demand punishment for slander upon his master,—where the latter has slandered his mother, being a married woman;—neither does it belong to a son to demand punishment for slander upon his father,—where the latter has slandered his mother, being a married woman;—because a master is not liable to any chastisement on account of his slave, nor a father on account of his son; whence it is that retaliation is not executed upon a father on account of his son, nor upon a master on account of his slave. But if the mother should have another son by another father, that son may demand punishment for slander to be inflicted, on behalf of his mother, upon the father aforesaid, because the occasion for punishment, (namely *slander*,) is in that case fully established, and the obstacle to the demand of it does not exist in the person who demands it.

A slave cannot demand punishment upon his master; nor a son upon his father.

IF any person accuse another of whoredom, and the person so slandered die, punishment for slander is not incurred. *Shaf'ei* maintains that punishment is not to be remitted. And in the same manner, if the slandered person should die after the infliction of a *part* of the punishment upon the slanderer, the remaining part thereof ceases, according to our doctors.—*Shaf'ei* alleges that it does not cease. This difference of opinion obtains because punishment for slander is a matter of *inheritance*, according to *Shaf'ei*, whereas according to our doctors it is not so. It is to be observed that there is no difference of opinion concerning the punishment for slander being a right of God, and also a right of the INDIVIDUAL;—because the punishment for slander has been ordained by the LAW for the purpose of removing scandal from the person slandered, and the advantage results solely to the slandered, on which account, punishment for slander is a right of the *individual*;—and it has also been ordained for the purpose of *determent*, (whence punishment for slander is termed *Hidd**,) and

The decrease of the slandered party prevents punishment.

* See the definition of *Hidd* in the beginning of this book.

the design of the institution is to purify the world from sin, and this demonstrates that punishment for slander is a right of God :—some of the *rules* in it, moreover, prove punishment for slander to be a right of the *individual*, such as that “ it cannot be decreed but “ where some person sues for it,” which is a right of an *individual*;—and, on the other hand, some of it's rules prove punishment for slander to be a right of God, such as, that “ the exaction of it is committed “ to the *magistrate*, and not to the *person slandered*.”—In short, in the punishment for slander there are two contending principles ; and such being the case, *Shafëi* gives the *first* principle the preference, namely, the *right of the individual*, considering that as superior to the right of God, the right of the individual being preferable, because of his being necessitous, whereas God is not necessitous : our doctors, on the other hand, give the *second* principle the preference, and hold it to be the superior, because in whatever degree the right of the creature may be concerned, the Creator is the surety, and the guarantee thereof ; and hence the conversation of the rights of the individual is therein obtained : but the case is not the same in the *reverse* of this proposition, because there is no authority to exact the right of God, but in the way of a vicarious delegation. These different tenets, as held by each party, are notorious ; and from them proceeds a contradiction of opinion respecting a variety of cases in punishment for slander. Thus, according to *Shafëi*, punishment for slander is an *inheritance* ; but in the opinion of our doctors it is not so, as inheritance obtains only in the rights of the *individual*, and not in the rights of God.—Again, the remission of it is not approved by our doctors ; but according to *Shafëi* it is approved : and again, it is not lawful to accept of any thing in lieu of punishment, according to our doctors ; but according to *Shafëi* this is lawful. It is recorded that the opinion of *Abou Yoosaf* respecting remission is the same with that of *Shafëi*.

Confession of
slander, can-

If a person make confession of slander, and afterwards retract from
such

such confession, his retraction is not to be credited, because, as the right of the slandered person is therein concerned, it is to be supposed that he will falsify the retraction:—contrary to such punishments as are purely *a right of God*, where the retraction must be admitted, as there is no person concerned to oppose the veracity of it.

not be re-
tracted.

If a man were to call an *Arab* a *Nabatbean**, punishment for slander is not incurred by him, because he is here supposed only to speak *comparatively*,—implying merely that the person he addresses is a *Nabatbean* in *badness of disposition*, or in want of virtue: and in the same manner, if a man were to say to an *Arab* “Thou art not an *Arab*,” no punishment would follow for the same reason.

A term of
abuse does not
constitute
slander.

If a man say to another, “O son of the rain,” he is not a slanderer, because these words may be considered as implying *purity* and *softness of manners*, as *rain* is distinguished by the qualities of *purity* and *softness*.

If a man, in speaking to another, should declare him to be the son of any of his parental relations other than his *father*, such as his maternal or paternal uncle, or his stepfather, he is not a slanderer, because it is common to bestow the appellation of *father* upon each of these relations, in the same manner as upon the *natural parent*.

If a man, being in anger, say to another *Zinte-secal-jiblee*†, and should plead that he thereby meant “you climbed up the hill,” yet punishment for slander is to be inflicted on him, according to the two *Elders*. *Mohammed* maintains that punishment is not to be inflicted

Equivocal ac-
cusation of
whoredom
incurs pu-
nishment for
slander:

* The *Nabatbeans* are a tribe upon the confines of *Yasit*, remarkable for the barbarity and ferocity of their manners.

† This may be either translated “you committed whoredom in the mountain,” or “you ascended the mountain,” as the term *Zinna* signifies not only whoredom, but also climbing, or ascending.”

on him, because the word *Zinte* means *ascending*, in its literal sense, and the mention of a *mountain* proves that such is intended by it. The argument of the two *Elders* is that *Zinte* is used to express *whoredom* also; and the circumstance of *anger* proves that by the word *Zinte* whoredom is intended; wherefore punishment is to be inflicted, in the same manner as if the term *Zinte* had been used *without* any mention of a *mountain*, and he were to say that by *Zinte* he meant *ascent*.

If one man were to say to another *Zinte ali-al Jiblee**, according to *some* doctors punishment for slander is not incurred by him, because the mention of a *mountain*, in this place, demonstrates that by *Zinte* he meant *ascending*; but according to *others*, punishment for slander is incurred, because a situation of *passion* and *abuse* proves the meaning of the speaker to be *whoredom*.

and so also,
mutual reci-
mination.

If one man should say to another "Thou art a whoremonger," and the other should answer "nay, but *thou*,"—they both incur punishment for slander, as attempting each to fix an imputation of whoredom upon the other.

Recrimina-
tion between
a husband and
wife induces
punishment
for slander
upon the
wife.

If a man should say to his wife "Thou adulteress!" and she should answer, saying, "Nay, but *thou*!" punishment for slander is incurred by the woman: and there is no *Laân* in this case; because the husband and wife are both equally accusers; but the accusation advanced by a husband against his wife induces *Laân*; and that by a wife against her husband induces *punishment for slander*; and punishment for slander is here first inflicted upon the woman in order to prevent *Laân*, as a person who has suffered punishment for slander is incapable of making *Laân*; for if this arrangement were reversed,

* Literally, "You ascended *upon* the mountain," or, "You have committed whoredom *upon* the mountain." The word *Alles* [upon] is the only difference between this and the preceding case.

(that

(that is to say, if the *Laín* were previously required of the woman,) neither the *Laín* nor the punishment would drop: the punishment, therefore, is to be first inflicted, in order that *Laín* may be prevented; for it is laudable to seek a remedy by which *Laín* may be avoided, because that is also punishment in effect *. But if the wife, in the example here recited, were to reply to her husband, "I have committed adultery with you," in this case there is neither punishment for slander, nor *Laín*; for there is a doubt concerning both punishment and *Laín*, as it is possible that the woman may allude to a fact of whoredom committed before marriage, in which case punishment for whoredom would be incurred by the woman, and not *Laín*, she having, by her reply, confirmed the assertion of her husband, in thus imputing whoredom to him; but by the husband nothing would be incurred, as he does not confirm her assertion: and on the other hand, it is also possible that she may allude to carnal connexion after marriage, as if she were to say, [in explanation,]—"My adultery consisted in your having connexion with me, after our marriage, against my will," (and this, in such a situation †, is the most probable meaning of her words,) in which case *Laín* would be incumbent upon the woman, and punishment for slander would not be incurred by her, as the accusation is made by the husband, and not by the wife: and in consequence of these two contradictory possibilities, a doubt exists equally with respect to *Laín* and punishment for slander; wherefore neither is to be insisted on.

If a man should have acknowledged a child born of his wife, and should afterwards deny it, in this case *Laín* is incumbent, because the

Case of acknowledgment of a

* And if the wife were first required to make *Laín*, and the punishment for slander (which the *Laín* would not prevent,) were afterwards inflicted on both parties, she would (by this mode of proceeding) suffer, in effect, two punishments, which is unlawful. To understand this rightly it is necessary to remark that the imposition of an oath is considered as a violence or hardship amounting to punishment.

† Of recrimination and scolding.

child, and
subsequent
denial.

parentage of the child has been established in him by his previous acknowledgment, and by his subsequent denial an accusation is implied with respect to his wife, who is the mother of the child; he must therefore make *Laán*. But if he should *first* deny the child, and *afterwards* acknowledge it, in this case punishment for *slander* is to be inflicted upon him, because when he thus falsifies, *Laán* is prevented, as *Laán* is a sort of punishment imposed from the necessity of the case, owing to a mutual falsification *, in which punishment for slander is the original thing, and hence, in a case where the mutual falsification is done away †, that which is the original must be put in force. The parentage also of the child is established in this man, in both these cases, since he has acknowledged it, whether such acknowledgment be made *before* denial, as in the *former* instance, or *after* denial, as in the *latter*.

OBJECTION.—In the former instance, upon *Laán* becoming incumbent, it should follow that the parentage of the child is not established.

REPLY.—Bastardy is not a necessary consequence of *Laán*, for *Laán* may be imposed without bastardizing the child, in the same manner as where a man denies a child after a long lapse of time from the period of the birth, in which case *Laán* is incumbent, and the child is not bastardized, but its parentage remains established;—as, on the contrary, a child may be bastardized in a case in which *Laán* is not incumbent; as where a husband denies a child born of his wife, who is a slave, in which case the child is bastardized, but *Laán* is not incumbent ‡.

* Where the wife denies the husband's assertion, and the husband denies the chastity of his wife.

† By one of the parties confessing the other to be in the right; as the husband here does, by acknowledging the child after having denied it.

‡ Owing to the wife being a *slave*.

IF a man were to say to his wife "This is neither *my* child, nor "yet *yours*," in this case *Lañ* is not incumbent, nor is punishment for slander due, as the husband here merely denies the child being born of his wife, and a husband is not a slanderer by such denial.

IF a man accuse of whoredom a woman who has children, the father of whom is unknown,—or if he should so accuse a woman who has made *Lañ*, in consequence of any of her children having been denied [by her husband], whether such children be living or not,—in neither of these cases is punishment for slander incurred, because the *signs* of whoredom are found with the woman, namely her *children*, who are without any acknowledged father: the reputation of this woman is therefore questionable, on account of these signs; and *perfect chastity of repute* in the accused is one condition of punishment for slander being incurred by the accuser. But if a man were to accuse of whoredom a woman who has made *Lañ* in consequence of an imputation of adultery made against her by her husband, and *not* on account of his denial of her children, in this case punishment for slander is to be inflicted upon the accuser, since here no signs of whoredom are found with the woman.

Accusation of a woman who has children destitute of any acknowledged father is not slander.

IF a man have unlawful commerce with a woman in whom he has no right of cohabitation *, punishment for slander is not to be inflicted upon his accuser, because *chastity of repute* is not applicable to the accused, (and this is conditional to his being *married*, in the sense which induces punishment for slander upon the accuser,)—and also, because the accuser in this instance speaks *truly*.

Accusation against a person who has unlawful commerce with a woman is not slander.

IT is to be observed as a rule, that punishment for slander is not incurred by the accusation of any person guilty of such a carnal con-

under certain restrictions.

* There are many cases of this description which do not amount to *whoredom*, as may be seen under the head of *Erroneous Connexion*, &c.

junction as is in its own nature unlawful, because the term *whoredom* [*Zinna*] signifies a carnal conjunction of this description:—but where a person forms such a carnal connexion as is unlawful on *some other* account, punishment for slander is incurred by the accusation of him, as a carnal conjunction of this description is not *whoredom*.—The connexion of a man with a woman who is not his property in any shape whatever, (such as a *strange* woman,) or with one in whom he has no property in some one shape, (as in a *partnership slave*, for instance,) is unlawful in its own nature; so also is his connexion with a woman who is his slave, but who is one with whom cohabitation is unlawful to him by a *perpetual illegality*, (such as his *foster sister*;) but his connexion with a slave with whom cohabitation is unlawful to him by such an illegality as is not of a *perpetual* nature, (as in the case of one with whose *sister* he cohabits, either as his *wife*, or as his *slave*,) is unlawful, on *another* account *. *Aboo Hancefa*, (in the case of *illegal* cohabitation under a *perpetual* illegality,) makes it a condition † that the perpetual illegality be universally admitted and established upon the authority of the most generally accepted traditions, so as to be determined and known beyond all *doubt* or *dispute*: for example, if a man were to accuse another, who had carnal connexion with a *partnership female slave*, in this case punishment for slander is not to be inflicted upon the accuser, because the accused appears to have committed the act with one who is his property in *one* shape, but not in *another*. But if a man were to accuse a person who has cohabited with his female slave, being a *Pagan*, or with his own wife during her courses, or with his *Mokâtiba*, punishment for slander is incurred by the accuser, because here the illegality (supposing the existence of the *right of property*,) is merely of a *temporary* nature, continuing only until the removal of

* That is to say, although it be not unlawful in *its own nature*, yet it is made so by *circumstances*: but this is not a *perpetual* illegality, as the prohibition (in the instance here cited) would be removed by the death or other means of removal of the *sister*: contrary to *perpetual* illegality, which existing in the *subject herself*, can by no means be removed.

† Of the act amounting to whoredom.

those

those obstacles, (namely *Paganism*, or the *courses*, or the contract of *Kitabut*;)—this illegality, therefore, is illegality on *another* account, and hence the act is not *whoredom*. It is recorded from *Abou Yoosuf* that the carnal conjunction of a man with his *Mokátiba* occasions the destruction of *Ibsán* in him; and such is also the opinion of *Ziffer*, because a *Mokátiba* is not her owner's *property* in respect to *carnal enjoyment*, (whence it is that if a master commit that act with his *Mokátiba*, he becomes responsible for her *Akir* :*)—our doctors, on the other hand, observe that the person of the *Mokátiba* is the property of her master, but that the enjoyment thereof (with respect to the *master*) is illegal on *another account* †, since it is an illegality which continues only until such time as the *Mokátiba* appears unable to pay her ransom, or the contract of *Kitubat* be broken.—If a man accuse a person who has had carnal connexion with his *female slave*, being his *sister* *sister*, punishment for slander is not due upon the accuser, because carnal connexion with this slave is prohibited to the master by a *perpetual illegality*: and this is approved doctrine.

If a person accuse a deceased *Mokátib* who may have left effects sufficient to discharge his ransom, yet punishment for slander is not due upon the accuser, because here is a doubt with respect to the *perfect freedom* of the *Mokátib*, the companions differing in opinion upon this point.

Punishment is not due for slandering a deceased *Mokátib*;

If a person accuse a *Mussulman* convert, who, whilst yet a *Pagan*, had married his *mother*, punishment for slander is to be inflicted upon the accuser, according to *Haneefa*;—but the two disciples allege that it is *not* due. The foundation of this difference of opinion is that the marriage of a *Pagan* with his own mother is approved among

or a convert, (before his conversion.)

* Meaning the portion which is to be paid to her in the manner of a *dower*.

† That is, not in *its own nature*, but occasioned by *circumstances*.

the *Pagans*, according to *Haneefa*,—but the disciples hold that it is *not* approved; as was explained at large in the book of *Marriage*.

Punishment is incurred by an infidel who slanders a *Mussulman*.

IF an infidel, residing under protection in a *Mussulman* state, should accuse a *Mussulman*, punishment for slander is incurred by him, because, in punishment for slander, the rights of the *individual* are concerned, and the protected infidel has undertaken to pay a due observance to the rights of individuals, since, as he himself desires to be screened from injury, it follows that he undertakes that he will not offer injury to others; and also, that he subjects himself to the consequence, if he should do so.

A *Mussulman* suffering punishment for slander, is incapacitated from being a *witness*:

IF punishment for slander be inflicted upon a *Mussulman*, his evidence cannot afterwards be received, although he should repent.—*Shafei* alleges that, in case of *repentance*, the credibility of his evidence is restored. This point will be further explained in treating of *Evidence*.

and an infidel also, (with respect to *Zimmes*.)

IF an infidel suffer punishment for slander, his evidence becomes inadmissible, not only with respect to *Mussulmans*, but also with respect to *Zimmes*,—because competency in evidence appertained to him with respect to all of his own description, (namely, *Zimmes*,) but his evidence is thenceforth to be rejected,—rejection of evidence being one of the consequences of punishment for slander.—But if this infidel should be afterwards converted to the faith, his evidence then becomes admissible with respect to *both* classes, (that is, both *Mussulmans* and *Zimmes*,) because, upon his embracing the faith, he obtains, *de novo*, a competency in evidence which did not before exist*, and the rejection of which, therefore, is not a consequence of the punishment for slander: contrary to where a slave suffers punishment for slander, and is afterwards emancipated; for here his evidence still

* Namely with respect to *Mussulmans*.

continues inadmissible, since, as he was not competent to appear *at all* as a witness, during his *slavery*, so as that the rejection * of his evidence might be the consequence of his having suffered punishment for slander, this circumstance will operate to that effect after his emancipation.

If a single stroke be inflicted on an infidel on account of slander, and he should then embrace the faith, and the remainder of the punishment be afterwards inflicted, in such case his evidence is admissible, because the rejection of evidence is the means of rendering punishment entire and complete, and is therefore a *manner* of punishment; but as the degree of punishment inflicted after his having embraced the faith is only a *partial correction*, and not what can be properly termed *punishment*, the rejection of evidence is not to be considered as a *manner* of it †.—It is recorded from *Abou Yoosaf* that his evidence must for the future be rejected, because the degree of punishment inflicted subsequent to his conversion is the *greater* proportion of it, and the *smaller* is a dependent of the *greater*. But the former is the more approved doctrine.

Case of an infidel embracing the faith during infliction of punishment.

If a man commit whoredom at several different times, or repeatedly drink wine, and the punishment for either be afterwards inflicted, the single punishment, in either instance, is considered as answering to all the repetitions of offence; and so also, if a person were repeatedly guilty of slander, and punishment for slander be afterwards inflicted on him. The ground of this, in the case of *whoredom* and *wine-drinking*, is that the punishment in both these

A single punishment answers to all the previous repetitions of whoredom or wine-drinking.

* Meaning the *inadmissibility*.

† This strange sophistry turns entirely upon the meaning of the term *Hidd*, which is defined to be a certain stated correction *completely executed*, any thing short of this not being *Hidd* [punishment], but only *chastisement*.

or *slander*.

instances is purely a right of God, and the design, in the infliction of it, is to deter people from the perpetration of such offences; and a probability of this end being obtained is established by a single infliction of punishment, wherefore the obtaining of it by *another* infliction of punishment is dubious*; and hence punishment cannot be inflicted a second time, because of this doubt: contrary to where a person commits whoredom, and is also guilty of *slander*, and of *wine-drinking*, for in this case a punishment is to be inflicted separately for every distinct species of offence, because each of these acts is of a nature different from either of the other two, and the design of each of them is different, wherefore, in the punishment of such acts there cannot be any coalescence: and with respect to *slander*, in the punishment of it the right of God is held by our doctors to be predominant, whence the same arguments apply to it as to *whoredom* and *wine-drinking*. *Sbafci* maintains that, in the case of *repetition* of slander, if the slandered person be different, (as if the first person slandered were *Zeyd* and the second *Amar*) or, if the person with whom the slandered is accused be different, (as if a man were to accuse *Zeyd* of whoredom first with one woman and afterwards with another,) in this case there is no coalescence of punishment, but for each slander a separate punishment must be inflicted; for according to *Sbafci*, in the punishment for slander, the right of the *individual* is predominant.

* Because having been, probably, already obtained, it is, (in that case) impossible that it should be obtained a *second* time

C H A P. VI.

Of *Taxeer*, or *Chastisement* *

TÂZEER, in its primitive sense, means *prohibition*, and also *instruction*; in *law* it signifies an infliction undetermined in its degree by the LAW, on account of the right either of GOD, or of the *individual*; and the occasion of it is any offence for which *Hidd* (or *stated punishment*) has not been appointed; whether that offence consist in *word* or *deed*. Definition of the term.

CHASTISEMENT is ordained by the LAW, the institution of it being established on the authority of the *Koran*, where GOD enjoins men to chastise their wives, for the purpose of correction and amendment; and the same also occurs in the traditions. It is moreover recorded that the prophet chastised a person who had called another *perjured*; and all the companions agree concerning this. Reason and analogy moreover both evince that chastisement ought to be inflicted for acts of an offensive nature†, in such a manner that men may not become habituated to the commission of such acts; for if they were, they might by degrees be led into the perpetration of others more atrocious. It is also written in the *Fatâvee Timoor-Tasbee* of *Imâm Sirukhsh*, that in *Taxeer*, or *chastisement*, nothing is fixed or determined, but Chastisement is ordained by the LAW;

* It is difficult to separate the ideas of *chastisement* and *punishment*.—The LAW, however, considers them as being essentially distinct, since the degree of *Hidd* (or *punishment*) is specified by the LAW itself, whereas, *Taxeer* (which for distinction's sake we render *chastisement*) is committed to the discretion of the magistrate, and for this reason it is elsewhere rendered *discretionary correction*.

† Meaning petty offences.

that the degree of it is left to the discretion of the *Kāzee*, because the design of it is *correction*, and the dispositions of men with respect to it are different, some being sufficiently corrected by *reprimands*, whilst others, more obstinate, require *confinement*, and even *blows*.

and is of four orders, or degrees.

In the *Fatāvee Shafee* it is said that there are four orders or degrees of chastisement;—**FIRST**, the chastisement proper to the *most noble of the noble*,—(or, in other words, princes, and men of learning,) which consists merely in *admonition*, as if the *Kāzee* were to say to one of them, “I understand that you have done thus, or thus,” so as to make him ashamed;—**SECONDLY**, the chastisement proper to the *noble*, (namely commanders of armies, and chiefs of districts,) which may be performed in two ways, either by admonition, (as above,) or by *ḡirr*, that is by dragging the offender to the door and exposing him to scorn;—**THIRDLY**, the chastisement proper to the *middle order*, (consisting of merchants and shop-keepers,) which may be performed by *ḡirr*, (as above,) and also by *imprisonment*; and **FOURTHLY**, the chastisement proper to the lowest order in the community, which may be performed by *ḡirr*, or by *imprisonment*, and also by *blows*.

Chastisement may be inflicted by the imposition of a *fine*.

It is recorded from *Aboo Yooṣaf* that the sultan may inflict chastisement by means of *property*,—that is, by the exaction of a small sum in the manner of a *fine*, proportioned to the offence; but this doctrine is rejected by many of the learned.

Chastisement may be inflicted by any person.

IMĀM-TIMOOR-TĀSHEE says that chastisement, where it is incurred purely as the right of God *, may be inflicted by any person whatever; for *Aboo Ḥafṣir Hindoodnee*, being asked whether a man, finding another in the act of adultery with his wife, might slay him,

* That is, where it is incurred by an offence committed merely against the LAW, and not affecting an individual.

replied,

replied, "If the husband know that expostulation and beating will be sufficient to deter the adulterer from a future repetition of his offence, he must not slay him; but if he see reason to suppose that nothing but death will prevent a repetition of the offence, in such case it is allowed to the husband to slay that man; and if the woman were consenting to his act, it is allowed to her husband to slay her also;"—from which it appears that any man is empowered to chastise another by *blows*, even though there be no magistrate present. He has demonstrated this fully in the *Meontaffee*; and the reason of it is that the chastisement in question is of the class of *the removal of evil with the hand*, and the prophet has authorised every person to *remove evil with the hand*, as he has said "*Whoever among ye see the evil, let him remedy it with his own hands; but if he be unable so to do, let him forbid it with his tongue*,"—(to the end of the speech.)—*Chastisement*, therefore, is evidently contrary to *punishment*, since authority to inflict the latter does not appertain to any but a magistrate or a judge.—This species of chastisement is also contrary to the chastisement which is incurred on account of the right of the *individual*, (such as in cases of *slander*, and so forth,) since that depends upon the complaint of the injured party, whence no person can inflict it but the magistrate, even under a *private arbitration*, where the plaintiff and defendant may have referred the decision of the matter to any *third person*.

CHASTISEMENT, in any instance in which it is authorised by the LAW, is to be inflicted where the *Imám* sees it advisable.

It is to be inflicted wherever it is authorised.

If a person accuse of whoredom a male or female slave, an *Am-Walid*, or an infidel, he is to be chastised, because this accusation is an *offensive* accusation, and punishment for slander is not incurred by it, as the *condition*, namely *Ihsán*, (or marriage in the sense which induces punishment for slander,) is not attached to the accused: chastisement therefore is to be inflicted. And in the same manner,

Chastisement is due for slandering a *free* or an *infidel*.

if

if any person accuse a *Mussulman* of any other thing than *whoredom*, (that is, abuse him, by calling him a *reprobate*, or a *villain*, or an *infidel*, or a *thief*,) chastisement is incurred, because he injures a *Mussulman*, and defames him; and punishment [*Hidd*] cannot be considered as due from analogy, since analogy has no concern with the necessity of punishment: chastisement therefore is to be inflicted. Where the aggrieved party is a *slave*, or so forth, the chastisement must be inflicted to the *extremity* of it: but in the case of abuse of a *Mussulman*, the measure of the chastisement is left to the discretion of the magistrate, be it more or less; and whatever he sees proper let him inflict.

It is not incurred by calling a *Mussulman* an *ass*, or a *dog*.

If a person abuse a *Mussulman*, by calling him an *ass*, or a *dog*, in this case chastisement is not incurred, because these expressions are in no respect defamatory of the person towards whom they are used, it being evident that he is neither an *ass* nor a *dog*. Some allege that, in our times, chastisement is inflicted, since, in the *modern* acceptance, calling a man an *ass* or a *dog* is held to be abuse.—Others again allege that it is esteemed such only where the person towards whom such expressions are used happens to be of *dignified rank* (such as a *prince*, or a *man of letters*,) in which case chastisement must be inflicted upon the abuser, as by so speaking he exposes that person of rank to contempt; but if he be only a *common* person, chastisement is not incurred: and our author remarks that this is the most approved doctrine.

The degree of it is from three stripes to thirty-nine.

THE *greatest* number of stripes, in chastisement, is *thirty-nine*; and the *smallest* number is *three*. This is according to *Haneefa* and *Mohammed*. *Abou Yoozaf* says that the greatest number of stripes, in chastisement, is *seventy-five*. The restriction to *thirty-five* stripes is founded on a saying of the prophet, “The man who shall inflict scourging to the amount of PUNISHMENT, in a case where PUNISHMENT is not established, shall be accounted an AGGRAVATOR,” (meaning, a wanton

wanton aggravator of punishment,) from which saying it is to be inferred that the infliction of a number of stripes, in *chastisement*, to the same amount as in *punishment*, is unlawful; and this being admitted, *Haneefa* and *Mohammed*, in order to determine the utmost extent of *chastisement*, consider what is the *smallest* punishment; and this is punishment for slander with respect to a slave, which is *forty stripes*; they therefore deduct therefrom *one stripe*, and establish *thirty-nine* as the greatest number to be inflicted in *chastisement*. *Abou Yoosaf*, on the other hand, has regard to the smallest punishment with respect to *Freemen*, (as freedom is the original state of man,) which is eighty stripes; he therefore deducts five, and establishes seventy-five as the greatest number to be inflicted in chastisement as aforesaid, because the same is recorded of *Alee*, whose example *Abou Yoosaf* follows in this instance. It is in one place recorded of *Abou Yoosaf* that he deducted only *one* stripe, and declared the utmost number of stripes, in *chastisement*, to be *seventy-nine*. Such, also, is the opinion of *Ziffer*; and this is agreeable to analogy*.—*Mohammed*, in his book†, has determined the smallest number of stripes in chastisement to *three*, because in fewer there is no chastisement. Our modern doctors assert that the smallest degree of chastisement must be left to the judgment of the *Imam*, or *Kahee*, who is to inflict whatever he may deem sufficient for chastisement, which is different with respect to different men. It is recorded of *Abou Yoosaf* that he has alleged that the degree thereof is in proportion to the degree of the offence; and it is also recorded from him that the chastisement for petty offences should be inflicted to a degree approaching to the punishment allotted for offences of a similar nature; thus the chastisement for libidinous acts, (such as *kissing* and *touching*,) is to be inflicted to a degree approaching to punishment for *whoredom*; and the chastisement for *abusive language*, to a degree approaching to punishment for *slander*.

* Because, in all other cases the deduction of *one* from the whole number is sufficient to reduce the thing from an higher to a lower class.

† Meaning the *Mabsoot*.

*Imprisonment
may be added
to scourging.*

If the *Kidnee* deem it fit, in chastisement, to unite *imprisonment* with scourging, it is lawful for him to do both, since imprisonment is of itself capable of constituting chastisement, and has been so employed, for the prophet once imprisoned a person by way of chastising him. But as imprisonment is thus capable of constituting chastisement, in offences where chastisement is incurred by their being established, imprisonment is not lawful before the offence be proved, merely upon *suspicion*; since imprisonment is in itself a chastisement: contrary to offences which induce punishment; for there the accused may be lawfully imprisoned upon suspicion, as *chastisement* is short of *punishment*; (whence the sufficiency of imprisonment *alone* in chastisement;) and such being the case, it is lawful to unite *imprisonment* with *blows*.

*The blows or
stripes may be
inflicted from
the most leni-
ent to the
severest de-
gree.*

THE severest blows or stripes may be used in chastisement, because, as regard is had to lenity with respect to the *number* of the stripes, lenity is not to be regarded with respect to *the nature* of them, for otherwise the design would be defeated; and hence, lenity is not shewn, in chastisement, by inflicting the blows or stripes upon *different* parts or members of the body. And next to *chastisement*, the severest blows or stripes are to be inflicted in punishment for *whoredom*, as that is instituted by the word of God in the *Koran*. Whoredom, moreover, is a deadly sin, insomuch that lapidation for it has been ordained by the LAW. And next to punishment for *whoredom*, the severest blows or stripes are to be inflicted in punishment for *wine-drinking*, as the occasion of punishment is there fully certified: and next to punishment for *wine-drinking*, the severity of the blows or stripes is to be attended to in punishment for *slander*, because there is a doubt in respect to the *occasion* of the punishment, (namely, the *accusation*,) as an accusation may be either false or true; and also, because *severity* is here observed, in disqualifying the slanderer from appearing as an evidence; wherefore severity is not also to be observed in the *nature* of the blows or stripes.

IF the magistrate inflict either *punishment* or *chastisement* upon a person, and the sufferer should *die* in consequence of such punishment or chastisement, his blood is *Hiddir*; that is to say, nothing whatever is due upon it; because the magistrate is authorised therein, and what he does is done by decree of the LAW; and an act which is decreed is not restricted to the condition of *safety*. This is analogous to a case of *plebotomy*;—that is to say, if any person desire to be let blood, and should die, the operator is in no respect responsible for his death; and so here also. It is, contrary, however, to the case of a husband inflicting chastisement upon his wife; for his act is restricted to *safety*, as it is only *allowed* to a husband to chastise his wife; and an act which is only *allowed* is restricted to the condition of *safety*, like walking upon the highway. *Shafci* maintains that, in this case, the fine of blood is due from the public treasury; because, although where *chastisement* or *punishment* prove destructive, it is *Kattl Khota*, or *homicide by misadventure*, (as the intention is not the *destruction*, but the *amendment* of the sufferer,) yet a fine is due from the public treasury, since the advantage of the act of the magistrate extends to the public at large, wherefore the atonement is due from their property, namely from the *public treasury*. Our doctors, on the other hand, say that whenever the magistrate inflicts a *right of God* upon any person, by the decree of God, and that person dies, it is the same, as if he had died by *the visitation of God*, without any visible cause; wherefore there is no responsibility for it.

If a person die, in consequence of chastisement, there is no fine.

H E D A Y A;

B O O K VIII.

Of *SÂRAKA*, or *LARCINY*.

- Chap. I. Introductory.
- Chap. II. Of Thefts which occasion Amputation, and of
 Thefts which do not occasion it.
- Chap. III. Of *Hira*, or *Custody*, and of taking away property
 thence.
- Chap. IV. Of the Manner of cutting off the Limb of a Thief,
 and of the Execution thereof.
- Chap. V. Of the Acts of a Thief with respect to the Property
 stolen.
- Chap. VI. Of *Katta-al-Tareek*, or Highway Robbery.
-

C H A P. I.

Definition of
Sâraka.

SÂRAKA literally means *the secretly taking away of another's property*. In the language of the law it signifies the taking away the property of another in a secret manner, at a time when such property is *in custody*,—that is, when the effects are in supposed security

security from the hands of other people; and where the *value* is not less than ten *dirms*, and the effects taken the undoubted property of some other than of him who takes them.

CUSTODY is of two kinds; FIRST, custody by *place*, that is, by means of such a *place* as is generally used for the preservation of property, as a *house*, or a *shop*; SECONDLY, by *personal guard*, that is, by means of a *personal watch* over the property.

Custody is of two kinds, local and personal.

THE primitive sense of *Sāraka*, or *Larciny*, (namely, *secretly taking away*,) includes, (in a *legal view*,) the *beginning* and *end* of the transaction, where the theft is committed in the *day-time*,—but the *beginning* only, where the theft is committed during the *night*, when the thief secretly breaks into the house, and then takes away the property by open violence. The reason of this is that many thefts are committed during the *night*, by the thief *forcibly* carrying away the property, as at that time the injured person cannot obtain any assistance. If, therefore, the circumstance of the thief's *secretly breaking into* the place of custody, or house of the proprietor, were not sufficient to establish a charge of *theft*, punishment would in many instances be prevented: contrary to where the theft is committed during the *day-time*; for as the injured person can then obtain assistance, thefts are never attempted by open violence, at that season; and hence, in the establishment of a theft committed during the *day-time*, the *secretly taking away* includes both the *beginning* and the *end* of the transaction.

Definition of the felony requisite to constitute theft.

IN the greater species of larciny, (namely *highway robbery*) the *secretly taking away* is with respect to the *Imām*, whose duty it is to guard the highways by means of his assistants: in the inferior species, it is with respect to the proprietor, or the person who stands as his substitute.

Value of a
theft, to in-
duce punish-
ment must be
ten *dirms*.

If an adult, of sound understanding, steal out of undoubted custody ten *dirms*, or property to the value of ten *dirms*, the law awards the amputation of his hand; God having said in the *Koran*, "IF A MAN OR WOMAN STEAL, CUT OFF THEIR HANDS:" but regard must be had to the conditions of sanity of intellect, and maturity of age; because independent of these criminality cannot be established, and amputation is the reward of criminality. It is also requisite that the property stolen be of importance, and not of trifling or insignificant value; because men do not covet property of a trifling nature; nor do persons take such property *secretly*, but *openly*; wherefore that which constitutes larciny*, (namely, *secretly taking away*,) does not exist in taking property of a *trifling* nature, nor does any occasion for *determent* appear therein, as determent is regarded only in matters of frequent occurrence: besides, the theft of mere *trifles* is uncommon, because they are little coveted. It is therefore requisite that the property for the theft of which the hand of the thief is struck off, be of value and importance.—Concerning the *amount* of the value there are various opinions: according to our doctors it is *ten dirms*: according to *Shafei* it is the fourth of a *deenar*; in the opinion of *Malik* it is *three dirms*. The argument of *Malik* and *Shafei* is that, in the time of the prophet, amputation was inflicted for the theft of any article of the value of a shield: now the lowest value of a shield, upon record, is three *dirms*; and regard must be had to the *lowest*, as that is precisely ascertained. *Shafei* also observes that the value of the *deenar*, in the time of the prophet, was estimated at *twelve dirms*, the fourth of which is *three dirms*. Our doctors argue that, in this particular, regard ought to be had to the *biggest* standard, (as this is seeking a means to ward off the infliction of punishment,) because in *less* there is a doubt concerning the criminality; and *doubt* operates to the prevention of punishment. A corroboration of this tenet of our doctors is found in a precept of the prophet, viz.. "There is

* Arab. *Raknal Saraka*, that is, the *pillar* of larciny.

“ *no amputation for less than a DEENÂR, or TEN DIRMS *.*” It is to be observed that the term *dirm* is customarily used to express *coin*; from which it appears that the property stolen must be ten coined *dirms*, or something to the value of ten coined *dirms*, being the same as is mentioned in the treatise of *Kadoorce*, and also in the *Zâbir Rawdyet*; and this is the most approved doctrine, as herein regard is had to the completeness of criminality.—If, therefore, a person were to steal to the weight of ten *dirms* of silver, uncoined, and it fall short, in value, of ten coined *dirms*, amputation is not incurred by him. In the *weight* of the *dirm* the *septimal weight* is regarded, [that is, in the proportion of seven *Miskals*, or $10\frac{1}{2}$ drams, to the *dirm*,] as this is the usual weight of it in all countries. What was before advanced—“ *or property to the value of ten dirms*,” means that any thing else is to be valued by *dirms*, although it consist of *gold*.—It is also an indispensable requisite that the property be taken out of a custody respecting which there is no doubt, since any doubt concerning that circumstance would occasion the remission of punishment, as shall be demonstrated in its proper place.

THE slave and the freeman, with respect to amputation, are upon an equal footing, as, in the text which occurs upon this head, no distinction is made between them; and also, because it is impossible to *have* amputation. The limb of a slave, therefore, is to be struck off in the same manner as that of a freeman, in order that men's property may be preserved.

Punishment
is inflicted
equally upon
freemen and
slaves.

* The value of the *dirm* seems to be very indefinite. It is elsewhere [Vol. I. p. 24.] observed that the *dirm* is about 2d. sterling, which precisely accords with its relative value, (as there mentioned) in respect to an *Awhiyat* of silver. But here we see the *dendir* estimated at ten *dirms*: now a *denar*, according to the best authorities, is nearly of the same value with a ducat, namely about seven shillings; and hence it would appear that the value of the *dirm* is from eight pence to nine pence sterling; and upon this calculation the value of a theft, to induce amputation, must be at least six and eight pence sterling. In fact, where the estimates are so various (owing, probably, to difference of times and countries) it is impossible to ascertain any precise standard.

AMPUTATION

Punishment is
due upon a
single con-
fession;

AMPUTATION is to be inflicted upon a single confession, according to *Haneefa* and *Mabommed*. *Abou Yoosaf* says that the limb of a thief is not to be struck off upon a single confession, nor until the confession be twice repeated: and it is also recorded from *Abou Yoosaf* that the confession must be made twice at two separate sittings [of the *Kadree's* court,] because *confession* is proof as well as *evidence*, and is therefore subject to a similar rule; and as, in evidence, two witnesses are indispensable, so in confession, repetition is required; as in *whoredom*, (for instance) where, confession being held subject to the rule of evidence, *four confessions* are required, in the same manner as *four witnesses*. The argument of *Haneefa* and *Mabammed* is that theft is rendered apparent by a single confession, which therefore suffices, in the same manner as in cases of retaliation, or punishment for slander; and there is no ground to judge concerning this from the rule in *evidence*, since by the abundance of witnesses, in evidence, the suspicion of falsity is lessened with respect to the witnesses; but a repetition of confession is altogether useless, since no suspicion exists with respect to the person confessing, which might be lessened by a repetition of his confession: neither is this repetition of any advantage in precluding a subsequent retraction, as the door of retraction or denial, in a case of *punishment*, is not shut by a repetition of confession; and in a case of *property*, retraction or denial are not admitted after confession, although it be only *once* made, because the proprietor is ready to disprove it: and the rule of repetition of confession, in whoredom, is contrary to analogy, wherefore confession in theft cannot be judged upon the same principle.

and also upon
the testimony
of two wit-
nesses.

AMPUTATION is to be inflicted upon the testimony of two witnesses, because by the testimony of two witnesses the theft is made apparent, and fully established, in the same manner as in all matters of right. But it is incumbent on the magistrate to examine the witnesses concerning the *manner* of the theft, and also the *time* and *place*, for the greater caution, as was mentioned in treating of whoredom. The thief must
also

also be held in confinement, on suspicion, until the witnesses be fully examined.

If a *party* commit a theft, and each of the party receive *ten dirms*, the hand of each is to be cut off: but if they receive *less* than ten dirms each, they are not liable to amputation, because the occasion thereof is stealing to the amount which constitutes *larciny*, namely, ten *dirms*: amputation, moreover, is to be inflicted upon each on account of his offence, wherefore regard is had, with respect to each, to the completeness of the standard amount of *theft*, which is ten *dirms*.

A number concerned in one fact are all equally liable to punishment.

CHAP. II.

Of *Thefts* which occasion *Amputation*, and of *Thefts* which do *not* occasion it.

AMPUTATION is not incurred by the theft of any thing of a *trifling* nature, and the use of which is allowed among *Mussulmans*, such as *wood, bamboos, grass, fish, fowls*, and *garden-stuff*;—because *Ayeesha* has said that in the time of the prophet this punishment was not inflicted for such petty thefts; and also, because people are little interested in things which, although in their own nature *lawful*, yet are in no respect particularly desirable: besides, men not coveting these things, it is not probable that any one should take them without the owner's consent; it is therefore not requisite to make examples, in order to deter people from such thefts; (whence it is that amputation is not incurred by a theft of less than ten *dirms*.) *Custody*, moreover, with respect to such articles, is *defective*, insomuch that pieces of *timber* (for instance) are thrown down without the door, and are not brought

Amputation is not incurred by stealing things of trifling value,

brought within the house, unless for the purpose of making repairs, and not with a view to *custody*; and *fowls* run about at pleasure, and *game* fly away; and in the same manner, things which are naturally lawful (such as the articles before-mentioned) are held, in their original state, to be *common property*, and this general participation occasions a doubt, which operates to the prevention of punishment. Let it be also observed that salt *dried fish*, are here considered in the same predicament as *fresh*: and in the same manner, *tame fowls*, and *geese*, and *pigeons* are included among the *fowls* before-mentioned, as the precept of the prophet, to wit “*There is no amputation for FOWLS,*” is general, and extends to all the feathered species. It is recorded from *Abou Yoozaf* that amputation is incurred by the theft of any article whatever, except *water*, *flowers*, and *Soorkeen* *; (and such also is the opinion of *Shafëi*,)—but the tradition of *Ayeesha*, as before recited, is in proof against them.

or things
which quick-
ly decay,

AMPUTATION is not incurred by the theft of such things as quickly *spoil* and *decay*, such as *milk*, *flesh-meat*, or *fruit*; because of the saying of the prophet, “*The hand shall not be cut off for stealing DATES, PALM-FRUITS†, or VICTUALS.*” By the word *victuals*, mentioned in this tradition, is meant such things as soon spoil, such as victuals cooked or ready for *eating*, and whatever else is of the same description, such as *flesh* and fruits; but not *grain*; because, if a person were to steal *wheat*, (for instance) or *sugar*, all the doctors agree that his hand should be struck off. *Shafëi* mentions that the hand is to be struck off for the theft of *all* the articles aforesaid, because of the saying of the prophet “*The hand shall not be*

* *Cowdung* dried for *firing*.

† *Arab. Kooja*. It is not, properly speaking, a *fruit*, but a species of *kernel*, weighing six or eight ounces, and resembling, in taste, the kernel of the hazel nut. It grows at the top of the palm-tree, and is a sort of crown to the pith, each tree bearing only one: it is commonly called the *cabbage* of the palm-tree.

“*struck*

"*struck off for stealing DATES or PALM-FRUITS,—but where those are kept in a barn**, amputation is incurred by the theft of them."

Our doctors, on the other hand, contend that this saying implies no more than that the hand of a thief shall be struck off for stealing *dried dates*, according to what is the general usage, (for the general usage is to keep *dried dates* in barns,) and for stealing *dried dates* the hand of a thief is struck off according to our doctors also.

AMPUTATION is not incurred by stealing fruit whilst upon the tree, or grain which has not been reaped,—these not being considered as *in custody*. or fruit upon the tree, or grain upon the stalk,

THE hand of a thief is not struck off for stealing any fermented liquor, because he may explain his intention in taking it, by saying, "I took it with a view to spill it;" and also, because some fermented liquors are not lawful property, such as *wine* for instance,—and concerning *others* there is a doubt, as to their being *property*.

THE hand is not to be cut off for stealing a guittar or tabor, these being of use merely as idle amusements. or musical instruments,

AMPUTATION is not incurred by stealing a KORAN although it be ornamented†. This is the *Zâbir Rawâyet*. *Shafëi* says that by stealing a KORAN amputation is incurred, because KORANS are capable of valuation, and therefore a saleable article. There are two opinions recorded from *Abou Yoozaf* upon this point: according to *one* he coincides with *Shafëi*; but, according to *another*, he maintains that the hand is to be struck off for stealing a KORAN, where the value of the ornaments amounts to *ten dirms*, because those ornaments are not a constituent or a KORAN,

* *Arab. Jooresen*, a sort of drying-room. † With gold or silver clasps, jewels, &c.

part of the KORAN, and are therefore to be considered *separately*. The reasons for the decision in the *Zâbir Rawâyet* are *twofold*: FIRST, the person who takes the KORAN may plead that his intention was merely to *look into* and *read* it: SECONDLY, a KORAN is not property, with respect to what is *written* in it; and the *custody* and care of it is only on account of what is *written* in it, and not for the sake of the *binding*, the *ornaments*, or the *paper*, these being merely *appendages*; and, as such, not to be regarded:—in the same manner as if a person were to steal a skin containing *wine*, the value of the skin amounting to *ten dirms*; in which case the hand of the thief would not be struck off; and so in this instance likewise.

or the door of
a mosque,

THERE is no amputation for stealing the door of a *mosque*, as this is not an object of *custody*, and is therefore the same as the door of a house; nay, it is still less the object of custody than a *house-door*, since that serves for the preservation of the effects within the house; whereas the door of a *mosque* does not answer this purpose; whence it is that amputation is not incurred by stealing such effects as are kept within a mosque.

or a crucifix
or chest-board,

AMPUTATION is not incurred by stealing a *crucifix*, although it be of gold,—nor by stealing a *chest-board* or *chest pieces* of gold, as it is in the thief's power to excuse himself, by saying “I took them with a view to *break* and *destroy* them, as things prohibited.” It is otherwise with respect to *coin* bearing the impression of an *idol*, by the theft of which amputation is incurred; because the *money* is not the object of worship, so as to allow of its destruction, and thus leave it in the thief's power to excuse himself. It is recorded, as an opinion of *Abou Yoozaf*, that if a *crucifix* be stolen out of a Christian place of worship, amputation is not incurred; but if it be taken from a *house*, the hand of the thief is to be struck off, for in such a situation it is lawful property, and the object of *custody*.

THE hand of a thief is not to be cut off for stealing a *free-born infant*, although there be *ornaments* upon it; because a *free* person is not *property*, and the ornaments are only *appendages*; and also, because the thief may plead that “ he took it up when it was crying, with a “ view to appease it, or to deliver it to the *nurse*.” *Aboo Yoosaf* says that the hand of the thief is to be cut off where the value of the ornaments upon the child amounts to ten *dirms*; because, as amputation would be incurred by the theft of the ornaments *alone*, it is so, where they are stolen along with any thing else.—The same difference of opinion obtains where a person steals a vessel of *silver* (for instance) containing *pottage*, or any other culinary preparation. It is to be observed that this difference of opinion holds only where the child is incapable of *walking* or *speaking*, for such a child is not *in its own* power or custody.

or a free-born
infant.

AMPUTATION is not incurred by stealing an adult slave, as such an act does not come under the description of theft, being a *usurpation*, or a *fraud*.

or an adult
slave.

AMPUTATION is incurred by stealing an *infant* slave, as the construction of theft is applicable to this offence: but if this infant slave be such as can give an account of himself, in this case amputation is not incurred, because an infant of this description is the same as an adult, in this, that both are equally in their own custody. *Aboo Yoosaf* says that amputation is not to be inflicted for stealing a slave, although he be an infant destitute of judgment, and unable to speak. This proceeds upon a favourable construction of the law, because a slave is a *man* in one respect, and in this view is not a property, although he be so in *another* respect. The argument of *Haneefa* and *Mohammed* is that this infant slave is property, *generally* considered, as being capable of producing an *immediate* profit by the price which would arise from the sale of him, and also of producing a *future* profit by the service to be exacted from him after he becomes capable of ser-

It is incurred
by stealing an
infant-slave.

vice; he is therefore *property* at the same time that he is also a *man*.

It is not incurred by stealing a book, (unless it be a book of accounts,)

THE hand of a thief is not cut off for stealing a *book*, whatever be the subject of which it treats, because there the object of the theft can only be the *contents*, and that is not *property*. But yet it is to be observed that the hand is cut off for stealing a *book of accounts*, because there the *contents* are not the object of the theft, but the *paper* and other materials of which the book is composed, and that is appreciable property.

or a cur-dog.

THE hand of a thief is not cut off for stealing a *cur-dog*, because such an animal is in it's nature common property *, and not an object of attachment ; and also, because concerning it's being *property* there is a difference of opinion among the learned, and this occasions a doubt upon that head.

or a drum, tabor, pipe, or psaltery.

THE hand of a thief is not cut off for stealing a *drum, tabor, pipe, or psaltery*;—according to the two disciples, because, in their opinion, these articles bear no price, whence, if any person were to destroy them he is not responsible;—and according to *Haneefa*, because the person who takes them may excuse himself by saying that he took them with a view to *break* them.

It is incurred by stealing a flute,

THE hand of a thief is cut off for stealing a *flute* made of *Sinnan*†, *ivory, ebony, or box*, such as is termed, in the *Hindoostanee* dialect, a *Sakoon*, or *Sawdn*, as such is an object of *custody*, being held in estimation, and not of a *common* nature.

* *Arab. Moobah-el-affil*, that is, *free to any one to take indifferently*.

† A species of hard wood, resembling *lignum vitae*.

THE hand of a thief is struck off for stealing a *ring* set with an *emerald*, a *ruby*, or a *chrysolite*, as such are *rare* articles, and not held to be of an *indifferent* nature among *Mussulmans*; neither are they undesirable; such articles, therefore, are the same as *silver* or *gold*: or a thing set with precious stones,

THE hand of a thief is struck off for stealing utensils made of *wood*, such as a *platter* or a *door* (when not set in a *wall*) or a trunk, (although the hand would not be struck off for stealing a piece of *timber*,)—because these articles derive an intrinsic value from their *fashion*, and are therefore objects of *custody*: contrary to *matts**, as in these the *workmanship* does not exceed the value of the material of which they are composed, for which reason *matts* are spread in places where they are not in *custody*: the learned, however, agree that amputation is incurred by stealing *Baghdad* matts, as in *those* the value of the *workmanship* exceeds that of the *article*. It is to be observed, that by stealing a *door*, or other article of timber not set in the *wall* of a house, amputation is incurred where such door or other article is so light as to admit of *one man* carrying it away, as thieves do not covet articles of timber which are not portable. or wooden utensils.

A BREACH of *trust*†, by a trustee secreting any property committed to his charge, does not induce amputation; as a *deposit* is not in custody of the *proprietor*. In the same manner, the hand of a *plunderer*,‡ or of one who *snatches away* any thing, is not struck off, as It is not incurred by a breach of trust, or by open rapine.

* Meaning any articles which are constructed of split *reeds* or *bamboos*.

† *Arab. Khidmit*: (part. *Khayin*.) It in this place evidently means *breach of trust* by the context, but it bears a variety of other meanings, such as to *deceive*, to *betray*, &c.

‡ It is difficult to distinguish between *rapine* and *robbery*; but this and the next following term, (like *Ghasb*, or *usurpation* of property,) have, perhaps, a reference to practices prevalent among the *Arabs*.

the act of such is not *theft*, since those carry away the property *openly*, and not *in a secret manner*; and the prophet has said, “*The hand of a PLUNDERER, or a SNATCHER AWAY of property, or a BREAKER OF A TRUST, is not to be cut off.*”

or by stealing
from the
dead,

THE hand of a *Nibāsh*, or plunderer of the dead, is not struck off. This is the opinion of *Haneefa* and *Mohammed*. *Aboo Yoosaf* and *Shafēi* hold that amputation is incurred upon a *Nibāsh*, because the prophet said “*Whoever steals a winding-sheet his hand shall I cut off;*”—and also, because a winding-sheet is an object of *custody*, and appreciable property: the hand, therefore, is struck off for stealing it. The arguments of *Haneefa* and *Mohammed* upon this point are twofold: FIRST, the prophet has said “*The hand of a MOOKHTAFEE is not to be cut off;*” and, in the dialect of *Medina* a plunderer of the dead is termed a *Mookhtafee*: SECONDLY, concerning the property in a winding-sheet there is a doubt; because the *deceased* is certainly not the proprietor, as a corpse is mere *dead matter*; and his *heir* is not the proprietor, as the necessity of the deceased precedes the inheritance of his heir; and there is also an uncertainty of the design of amputation (namely *warning*, or *determent*,) being obtained in this case, as this is a fact of rare occurrence. With respect to the declaration of the prophet, quoted by *Yoosaf* and *Shafēi*, it is to be considered merely as a *threat*. The same difference of opinion prevails in a case of stealing a winding-sheet from a mausoleum, having a door secured by a *lock*: or where a winding-sheet is stolen out of a coffin whilst upon a journey*.

or from the
public trea-
sury,

THERE is no amputation for stealing from the public treasury, because every thing there is the common property of all *Mussulmans*, and in which the thief, as a member of the community, has a share.

* That is, whilst carrying to the family place of interment, which may sometimes be at the distance of several days journey, in which case the corpse is put in a coffin; for otherwise the coffin is not used.

IF a person steal from property of which he is in part owner, in this case amputation is not to be inflicted.

or from property in which the thief has a share;

IF a creditor steal from the property of his debtor, to the amount of his debt, amputation is not incurred, because this is not *theft*, but only an exertion of his right : and a *deferred* debt * is the same as an *und deferred*, with respect to this rule. The same rule obtains where a person steals any thing which is originally his own property †, because a man has a right in whatever is his own. But if a creditor steal from his debtor any articles of his chattel property [that is, *goods* or *effects*,] in this case amputation is to be inflicted, because a creditor is not at liberty to take his right out of the debtor's goods or effects, except by selling them, with the debtor's consent, and reimbursing himself out of the price. It is recorded from *Abou Yoozaf* that here likewise amputation is not incurred, because many of the learned hold that a creditor is at liberty to seize the effects of his debtor for the purpose of obtaining his right, or by way of *pledge*. To this our doctors reply, that as this opinion is not supported by any authority, taking the goods as a satisfaction, or in the manner of a *pledge*, is not admitted without a plea : but, if the creditor should make a plea, by saying " I took these " effects of my debtor only as a pledge in security of my right,"—or,—" as a satisfaction for my right,"—in this case punishment is remitted, because he appears to have proceeded under a conception grounded upon the opposite opinion of *Abou Yoozaf*, as above recited. The same difference of opinion also obtains if the right of the creditor consist of *dirms*, and he steal *deendrs*, some holding that he incurs amputation, as the *deendrs* are not his right,—whilst others maintain

or by a creditor stealing from his debtor.

* *Arab. Dynt-Muwjil*, meaning a debt in the payment of which a delay is allowed for a certain specified time, in opposition to a *Dynt Moudjil*, or *prompt* debt, that is, a debt, payable upon-demand

† As having been borrowed of him by another for instance..

that his hand is not to be struck off, because *money*, (namely *dirms* and *deenârs*) is all of one and the same nature.

Amputation cannot be inflicted *twice*, for stealing the same article from the same person,

If a person steal any particular article, and suffer amputation of his hand for the same, and after returning the property stolen to the proper owner, again steal that same article, without its having undergone any change in the interim, his foot is not to be struck off for such repeated theft. This proceeds upon a favorable construction of the law. Analogy requires that his foot be cut off; (and there is an opinion of *Abou Yoozaf* recorded to this effect; and such also is the doctrine of *Shafëi*;) because the prophet has said “*If he again steal, let amputation be again inflicted upon him*;” where no manner of distinction is made with respect to the article stolen in the *second* theft being the same as that which was stolen in the *first*, or not, as the *second* is a *complete theft* the same as the *first*, and even *more atrocious*, inasmuch as the thief, having already suffered punishment, yet dares to repeat the very same offence. The offence is indeed the same as if the owner were to sell the article stolen to the thief, and again to purchase it of him, and the thief then to steal it of him a second time. But the reasons for a more favourable construction of the law herein are *two-fold*:—*FIRST*, in consequence of the amputation of the thief’s hand, the protection* of the thing stolen ceases,—that is, in consequence of cutting off the thief’s hand, the article stolen no longer remains protected in behalf of the right of the individual, (as shall be hereafter demonstrated;)—and although, on returning it to the owner, it revert to a state of protection, yet an apprehension of the protection having ceased still remains, judging from unity of *right of property* and of *subject*, and from the existence of the *cause* of the failure of protection,—that is, judging from the circumstances of this property being that same individual property the protection of which had been already destroyed by the former theft and subsequent punish-

* *Arab. Ismut.* Our lexicons give *Tutâmen* as the *original* and *Castitas* as the *occasional* meaning of it.

ment,—

ment,—and of the *present* proprietor being the same who was *formerly* proprietor,—and of the *cause* of the failure of protection (namely, the amputation already inflicted) being still existent: contrary to the case adduced by *Shafes*, because in *that* case the right of property has been of a *different nature*, as being derived from a *different source**:—

SECONDLY, the *repetition* of the theft of the same article by the same thief, after his hand being cut off, is a circumstance of rare occurrence; wherefore the infliction of punishment a *second* time can answer no end; for the end of punishment is to restrain from guilt; and that end is obtained without a *second* infliction of punishment; the case in question being analogous to one where a person who had been punished for slander again accuses the slandered person of the same fact of whoredom with which he had before charged him, in which instance a *second* punishment is not incurred by slanderer; and so here likewise.—What is now advanced proceeds upon the supposition that the thing stolen does not undergo any *change* after being returned to the owner:—but if it be changed from its former state, (as if a person were to steal thread, and suffer amputation, and return the thread to the owner, and the thread be afterwards woven into *cloth*, and the thief should then steal the cloth,) the thief's foot is cut off, because the thing stolen has been altered by *weaving*; (whence it is that if a person seize a parcel of thread by *Ghasb*, [usurpation,] and weave the thread into cloth, he becomes proprietor of the cloth in consequence of weaving it:—and this is an example of *change*, applicable to any subject whatever :) and where the thing stolen undergoes a *change*, the *doubt* arising from unity of subject, and amputation on account of the former theft of it, is removed; wherefore amputation is repeated, by cutting off the foot.

unless it have undergone a *change* in the interim between the thefts.

* The *source* or *cause* of the *last* right of property being *purchase from the thief*, which is totally distinct and different from the *cause* of the *first* or *original* right of property, whatever that may have been.

C H A P. III.

Of *Hirz*, or *Custody*; and of taking away Property thence.

There is no amputation for stealing from a father, mother, or child;

or from any prohibited relation;

If a person steal any thing from the property of his *father*, *mother*, or *son*, his hand is not cut off; because any of those is at liberty, by a *mutual right of usufruct**, to take and use the property of the other; and also, because the effects of either of them is held, in virtue of this mutual right, to be within the custody of the other: and in the same manner, if a person steal from the property of his relation within the prohibited degrees, his hand is not cut off, for the *second* of the above reasons: contrary to the case of persons who are merely *friends*, for if one of these were to steal from the other, his hand is cut off, since his act of *theft* puts an end to their friendship. What is now stated respecting the case of theft from a relation within the prohibited degrees is contrary to the doctrine of *Shafëi*, he accounting the affinity of all except parents and children to be a *distant* affinity, as was before mentioned, in treating of the emancipation of slaves.

or from a stranger, in a prohibited relation's house. It is incurred by stealing from a prohibited relation in a stranger's house;

If a person steal, out of the house of his relation within the prohibited degrees, the effects of a stranger, his hand is not cut off; but if he steal the effects of a prohibited relation out of the *stranger's* house, his hand is struck off; because in the *former* case the theft is not a violation of custody whereas in the *latter* it is so.

* *Arab. Imbist*, literally meaning "a mutual liberty."

If a person commit a theft upon the property of his foster-mother, his hand is cut off. This is the *Zábir Rawáyet*. It is recorded from *Aboo Yoosaf* that his hand is *not* to be cut off, because men are at liberty, at all times, to enter their foster-mother's apartments without form or permission: contrary to the case of a foster-sister; for the reason which operates in the instance of a foster-mother does not here exist. The ground upon which the *Zábir Rawáyet* proceeds herein is that although *prohibition* subsist between a man and his foster-mother, yet there is no *relationship* between them; and the prohibition which exists independent of affinity (such as that occasioned by *whoredom*, or *touching in lust**,) has not the full effect of prohibition by affinity, whence, if a man were to steal any thing out of the house of the daughter of a woman with whom he had committed whoredom, his hand would be cut off, although between him and the daughter prohibition exist. By stealing, therefore, from the property of a foster-mother, amputation is incurred. The foundation of this is that fosterage is not commonly a thing of *notoriety*, wherefore men have not a mutual right of usufruct with their foster-mothers, in order to avoid giving room for suspicion: contrary to the right which subsists with respect to the *natural* mother.

or from a
nurse.

If, of a husband and wife, either party should steal from the property of the other,—or a slave from the property of his master, or of his master's wife, or of his mistress's husband,—in none of these cases is amputation incurred, because in all of them the thief is, by custom, at liberty to enter the house or apartment of the proprietor. If, moreover, in the same case of a husband and wife, either were to steal any thing from a place of custody belonging exclusively to the other, (as if, out of an apartment solely reserved to the other's use, and in which they do not both reside,) in this case also the hand of

It is not incurred by stealing from an husband, or wife; or master or mistress; or a master's wife, or a mistress's husband:

* See Book II. chap. 2.

the thief is not cut off, according to our doctors, (who in this instance differ from the opinion of *Shaf'ei*,) as there is a mutual right of usufruct between husband and wife, both according to *custom*, and also *by construction*, for the contract of marriage demonstrates this mutual right of usufruct between them. This dissent of *Shaf'ei*, in the present case, corresponds with his difference of opinion with respect to giving evidence; for the evidence of a husband or wife regarding each other is not admitted by our doctors; but by *Shaf'ei* it is admitted.

nor by a
master steal-
ing from his
Mokâtib.

IF a master steal from the property of his *Mokâtib*, his hand is not struck off, because a master has a right in his *Mokâtib*'s acquisitions. And in the same manner, the hand of a thief is not cut off who steals any thing out of *publick plunder*, because in that he has a share. This case, with its reasoning, is taken from *Alec*.

Two different
descriptions
of custody.

CUSTODY is of two kinds: FIRST, that which is *custody* from its own nature, such as a house or *Serai**; SECONDLY, *custody*, by personal guard.—(The compiler of the *Hedâya* observes that custody is an indispensable requisite to the establishment of larciny, since without custody the circumstance of *secretly taking away* cannot be established.) Thus *custody* is sometimes constituted by *place*, that is by a place constructed or appointed for the safe keeping of goods and effects, such as a *house*, *shop*, *tent*, or *trunk*; and it is also sometimes constituted by personal guard, that is, by personal watch over the property, such as if a man were to sit in the middle of the highway, or in a mosque, having his effects near him, in which case those effects are in *keep* or *custody*; and the prophet once cut off the hand of a person who had stolen a quilt from underneath the head of *Sifwan*, whilst he lay asleep in a mosque. It is to be observed that an article

* A quadrangular building, having sheds or houses all opening into the square within. A high wall surrounding the whole forms the back of the houses or shops; and the only entrance is by one or (at most) two gateways.

which is in custody by *place* is not in custody by *personal guard*: and this is approved, since that article is in custody, *without* any *personal guard*, by the custody of *place*, (such as a house, and so forth,) although that place be without a *door*, or have a door standing open, (whence if a person steal any of the furniture from that place, his hand is cut off,) because a house or such other edifice is erected for the purpose of security. The hand, however, is not to be cut off unless the article stolen be carried out of the house, for until that happens it is considered as in the hands of the master of the house: contrary to things in custody by *personal guard*, for here the thief's hand is struck off for the mere *taking*, as on the instant of *taking* the property of the proprietor is destroyed; wherefore the larciny is completed by the *taking* alone. It is to be further observed that no distinction is here made between the keeper being *asleep* or *awake*, or the effects being *under* him, or *near* him: and this is approved; because a person sleeping *near* his effects is accounted to be *watching* them, in common acceptance; upon which principle it is that a trustee or borrower is not responsible, where the trustee sleeps near the deposit, or the borrower near the article borrowed, in case of any accident befalling it, because their sleeping is not held a desertion of the charge of that property: contrary to what is adopted in the *Fatávee**, for in some decrees it is said that if the trustee or the borrower lie down with the deposit or the loan under his head, and it be stolen, he is responsible.

If a person steal things out of a place which constitutes custody, such as a *house*,—or from a place which does *not* constitute custody, whilst the proprietor is near and has them within his guard,—his hand is struck off, because he has stolen property from *one* of the *two* species of *custody*. Various cases of custody.

* A collection of decrees or decisions of the *Musselman Muftis* or *Kázess*. There are many law books which bear this title.

If a person steal property out of a *bath*, or from a house which the owner allows all men indifferently to enter, his hand is not to be cut off, because general access is allowed to a bath by *custom*, and to a house by a particular permission, whence there is a doubt with respect to such a place constituting *custody*. This is where the things are stolen out of the bath or house during the existence of such general leave of ingress: and the same rule applies to shops or *Caravan-Serais*, because the master allows men to enter a shop or *Caravan-Serai*:—but yet, if a person were to steal any thing therefrom during the night, his hand is to be cut off, as those places are constructed for the protection of property, and people are allowed to enter them in the *day-time* only.

If a person steal goods out of a mosque, and the proprietor be near those goods, the hand of the thief is struck off, as they are under custody by *personal guard*: but if a person steal goods out of a bath or house the owner of which allows people to enter it, and the proprietor of the goods be near them, the thief's hand is not cut off. The difference between a *mosque*, and the bath or house now mentioned, is that a mosque is not erected with a view to the security of property, wherefore custody is in that case regarded as constituted by *personal guard*, and not by means of the *place*: contrary to the *house* or *bath*, as these are constructed for the purpose of security, wherefore custody there is not regarded as depending upon personal guard: and concerning such a place constituting custody there is a doubt, on account of the general permission of ingress; for which reason the thief's hand is not struck off.

Amputation
is not in-
curred by a
guest stealing
from his host;

If a guest steal the property of his host, his hand is not cut off, as the house of the host is not a place of custody with respect to the guest, because the guest is allowed to enter it,—and also, because a guest is as an *inhabitant* of the house of his host; the act of the guest, therefore, is *treachery*, or *breach of trust* only, and not *theft*.

If

If a person steal any thing in a *Serai*, and do not carry it entirely out of such *Serai**, his hand is not cut off; because the whole *Serai* is one place of custody, wherefore it is requisite to the establishment of the theft that the thing stolen be carried quite out of the *Serai*;—and also, because the *Serai* and whatever it contains is in the hands of the master of it, by construction, wherefore there is a doubt whether the thief has yet conveyed it away. If, however, the *Serai* be one of those which contain a number of independent habitations, the occupiers of which have no common use of the area or square, excepting merely as a *passage* or *thoroughfare*, and a person were to steal any thing out of one of these habitations, and carry it forth into the area, his hand is to be cut off, because every one of these habitations is (with respect to the *inhabitants*) a separate place of custody; for which reason, if one of these were to steal any thing out of the lodge or habitation of another, he incurs amputation.

nor by stealing in a *Serai*, unless the goods be carried out of the outer gate; or.

unless the *Serai* be particularly constructed.

If a thief break through the wall of a house, and enter therein, and take the property, and deliver it to an accomplice standing at the entrance of the breach, amputation is not incurred by either of the parties, because the thief who entered the house did not carry out the property; and that property, before his *coming out*, fell into the possession of another, which possession is regarded; and the other thief has not committed any violation of custody, as he did not enter into the place of custody; and hence the full sense of *larciny* is not applicable to the act of either of them. It is recorded from *Abou Yousaf* that if the thief who goes *within* the house put his hand *through* the breach, and the thief without thus take the property from him, the hand of the former is cut off: but if he who remains *without* put his hand *through* the breach into the house, and thus take the property from him who is *within*, each of them incurs amputation. This example is founded upon another which will be hereafter recited.—If the

Cases of *burglary*.

* That is, out of the outer gate of the quadrangle.

thief within throw the property out, through the hole, into the highway, and then come forth, and take it away, his hand is to be cut off. *Ziffer* says that his hand is not cut off, because the act of throwing the property out upon the highway affords no pretence for amputation, any more than if he were to go away *without* carrying off the property, or than if another person were accidentally to come and carry away the property from the place into which it has been thrown, which would not occasion amputation. Our doctors assert that the *throwing out* of the property is a contrivance commonly practised by thieves, as it may be impossible for a thief to get out with the goods or effects in his hand,—or, in order that the thief may be unincumbered, and at liberty, either to oppose the inhabitants of the house, or to escape; and as, in the case in question, the property does not fall into the possession of any other person, the *throwing out* and *carrying away* are both considered as *one act*. But where the thief comes out of the house, and goes away without carrying off the property, he stands as the *destroyer* of that property, and *not* as a thief. And if the thief load the property upon an ass or other animal, and leading the animal, thus take the property out of the house, in this case his hand is cut off, because the motion of the animal is referred to the thief, on account of his *leading* or *driving* him.

If a party, or band of robbers, come within the place of custody of any person, and some of them take away the property whilst the others stand by, they all incur amputation. The compiler of the *Hedaya* remarks that this proceeds upon a liberal construction of the law; for analogy would suggest that those only incur amputation who take and carry out the property, (and such is the opinion of *Ziffer*,) because, as they take the property out, the definition of larciny applies only to them.—Our doctors, however, assert that they are all, by construction, equally concerned in carrying out the property, as being all *aiding* therein, in the same manner as in the greater species of larciny, (namely, *highway robbery*,) where some take the property, whilst

whilst others stand by prepared for an attack; because it is customary for some to carry off the property, whilst others stand ready, with arms in their hands, to resist the proprietor; if, therefore, these were not liable to amputation, the door of punishment would be closed.

If a person make a breach in the wall of a house, and extend his hand through, and in this manner take any thing out, still his hand is not struck off. This is the *Zábir Rawáyet*. *Abou Tóosaf* has said that his hand is to be struck off, because he has taken the property out of a place of custody, and as this is the design of theft, his entrance into the place of custody is not requisite; in the same manner, as where a thief puts his hand into the chest of a banker, and takes out money, *without* himself entering the chest; in which case he forfeits his hand; and so here likewise. The reason for the decision in the *Zábir Rawáyet* is that the establishment of larciny rests upon a *complete violation of custody*, in order that no doubt may remain respecting it; and the violation of custody is *completely* established only where the thief enters the place of custody, and where the place admits of this being supposed: as, therefore, it is customary for thieves to enter into the place of custody, regard must be had to that circumstance. It is otherwise in the case of a *chest*, as there the *hand* only can be introduced, and not the whole *person*: it is otherwise, also, in the case before observed, of some thieves carrying away the property whilst others stand by, prepared to oppose the proprietor, as this is the custom of thieves.

If a person keep his money in his sleeve, and tie a knot upon it, in such a manner that the knot is on the *outside*, and a cutpurse come, and tear off the part of the sleeve which contains the money, and take it away, he does not incur amputation. If, however, a person keep his money in his sleeve, and tie a knot upon it, in such a manner that the knot is *inside* the sleeve, and a cutpurse carry it off by putting his hand *under* the sleeve and tearing off the part which contains the

Cases of theft
committed
upon the per-
son.

money, so taking it away, in this case his hand is to be struck off, as he here introduces his hand *within* the place of custody, (namely the sleeve) whereas, in the former instance, he took the money from *without*. If, on the other hand, he do not tear away the part which contains the money, but open or untie the knot, and so take away the money, the rule is reversed; that is, in the *first* of these cases his hand is cut off, but not in the *second*. The reason of this is that, in the *former* instance, where the knot is on the *outside*, by opening it the money falls *within* the sleeve, whence he is under a necessity of putting his hand within the sleeve, in order to take it away; amputation is therefore incurred, because here he takes the money out of a place of custody, and thus commits a violation of custody: but in the *latter* instance, where the knot is *inside* the sleeve, by opening it the money appears *outside* the sleeve; and as he thus takes it from the *outside*, and not from *within*, his taking it is not a violation of custody; his hand, therefore, is not cut off, as he has not committed a violation of custody. It is to be observed that, by the word *Sirrit*, in this work, is to be understood merely the place where the money is deposited in the sleeve, not a separate *bag* or *purse*. It is recorded from *Abou Yoozaf* that in all these cases amputation is incurred, because the property is *in custody*,—*with the proprietor*, in the one case, and *in his sleeve*, in the other. Our doctors, on the other hand, assert that the *custody*, in the case in question, is constituted by the person's *sleeve*, as he trusted in it for security; and his design in putting the money there is convenience, in going from place to place, and ease whilst at rest; wherefore the *security* of it is not his design, his *sleeve* not being considered as a *bag*.

Amputation is not incurred by stealing one out of a string of camels; or a camel's load,

If a person steal *one* out of a *string* of camels, or steal a *load* from *one* of them, his hand is not cut off, because with respect to the camel or the load being in *custody* there is a doubt. The reason of this is that the design of the drivers and riders is convenience upon the journey, and the transportation of their goods, and not the *security* or *protection* of them. If, however, there be a person attending the loads

for the purpose of looking after them, the learned say that in this case the hand of the thief must be cut off. If, also, the thief break open the package, and take its contents, his hand is struck off, because in such a case the *package* constitutes the *custody*, as the design in putting the goods there is the security of them, in the same manner as a sleeve; in this case, therefore, the definition of theft; namely, *taking property from custody*, is applicable; and such being the case, his hand is cut off of course.

unless the
package be
broke open.

If a person steal a bag or package, containing goods, from a place which does not constitute *custody*, (such as the *highway*,) whilst the proprietor of the effects is watching or sleeping near them, his hand is struck off, because those goods are in custody by means of the guard of their owner, as regard is had to the customary mode of watching things, and the owner of the bag sitting near or sleeping upon it is accounted to be in guard of it by custom:—his sleeping *near* it is also, from custom, accounted as *guarding* it;—this is approved doctrine.

Case of theft
from custody
of the person.

C H A P. IV.

Of the Manner of cutting off the Limb of a *Thief*, and of the Execution thereof.

THE right hand of a thief is to be cut off at the joint of the wrist, and the stump afterwards cauterised. The amputation is on the authority of the text of the *Koran* formerly quoted; and it is to be the *right* hand, on the authority of the reading of *Ibn Mas'ood*, who reads the passage alluded to—"CUT OFF THEIR RIGHT HANDS."

For the first
offence the
right hand is
to be struck
off;

and, for the second, the left foot; and for any beyond that the thief is to be imprisoned.

The amputation is particularly directed to be performed *at the wrist*, because the word **YED**, in the **KORAN**, signifies the *whole arm* up to the *shoulder*, and as the wrist joint is included therein, that is certified, wherefore in that sense the text is followed:—moreover, it is related of the prophet, in the *Nakl-Sabeeb*, that he ordered the hand of a thief to be struck off at the wrist. The cautery is to be applied to the stump; because of a precept of the prophet, “*Cut off the hand of a thief, and cauterise the part*;”—and also, because, if the cautery were not applied, the amputation might prove destructive; and punishment is inflicted with a view to *warning* and *determent*, but not for *destruction*.—If the thief who has thus been deprived of his hand again commit a theft, his left foot is to be cut off. If, however, he again be guilty of theft, a *third* time, he is not to suffer any further mutilation, but must be imprisoned, and held in confinement, until he repent. Concerning the *time* sufficient to effect and confirm such repentance there are various opinions; some saying that this is to be left to the judgment of the *Indm* or *Kázee*;—others, that the imprisonment should be *for one year*;—and others, that it ought to be *until death*;—whilst others, on the other hand, maintain that he is to be held in durance until such time as repentance be ascertained from his conversation and behaviour. What is here advanced,—“if he be again guilty of theft, a third time, he is not to suffer any further mutilation, but must be imprisoned,” &c. proceeds upon a favourable construction of the law:—and our modern doctors say that *Tázeer*, or discretionary correction, may also be inflicted. *Shafei* says that for the *third* offence the left hand is to be cut off, and, for the *fourth*, the right foot, because the words of the prophet are “*If a man commit a theft cut off one of his limbs; and if he again commit the same; cut off another limb; and if he again commit the same, a third time, cut off another limb; and if a fourth time, another; and if he commit theft a fifth time, put him to death*.”—There is also an ordinance of the prophet, still more particularly according with the tenets of *Shafei* upon this head, which is mentioned by *Abou Hareera*, who reports

reports the prophet to have said, "*Whoever commits a theft, his right hand is to be cut off; and if he again commit theft, his left foot; and if again, his left hand; and if again, his right foot: because the third theft is an offence in the same degree as the first, and is even more atrocious; wherefore for the third offence the law awards punishment in a superior degree.*" The arguments of our doctors upon this point are threefold: **FIRST**, *Alee* has declared, respecting a person who had been a third time guilty of theft, "*Willst I live by the favour of God, shall I not leave him a hand with which to feed himself, or a foot with which to walk?*"—the propriety of which declaration being disputed by some of the companions, *Alee* argued the point with them, and overcame their scruples; wherefore they all subscribed to his opinion, and consequently the whole of them are agreed concerning it: **SECONDLY**, the amputation of the left hand in the *third* instance, and of the right foot in the *fourth*, is in fact a destruction of the thief, since by cutting off the left hand he is totally deprived of *one* faculty, and punishment is instituted with a view to *determent* and not to *destruction*: **THIRDLY**, the repetition of theft a third time is a thing of *rare* occurrence, and determents are instituted concerning things which are of *frequent* occurrence. It is otherwise in retaliation, with respect to the members of the body; for as that is a right of the individual *, so the individual is to exact it, as far as may be practicable, on his own behalf. As to the tradition adduced by *Shaf'ei*, it is either unworthy of being seriously regarded, (as having been ridiculed by *Tabávee*,) or else it is to be considered merely as a *threat*.

If the left hand or right foot of a thief be paralytic, or have been lost by accident, his right hand or left foot must not be cut off, since by the loss of these he is deprived of one of his faculties of *walking* or *carrying*. In the same manner, the right hand of a thief must not be cut off where the thumb or any two fingers of the left hand

The left hand or right foot is not to be amputated in defect of the right hand or left foot.

* In opposition to punishment, which is a right of God, (*i. e.* of the LAW.)

are lost or useless ; because in such a state the hand is held to be incapable of performing its offices : but if only *one* finger of the left hand be useless or lost, the right hand may be cut off, because there is no apprehension of the hand being disabled from carrying, by the deprivation of *one* finger only.—It is otherwise where there are *two* fingers wanting ; as *two* fingers are held to be equivalent to a *thumb*, in respect to the capacity of *carrying* ; hence from the want of them it is to be apprehended that the hand is useless.

An executioner striking off the left hand instead of the right is not responsible ;

If the magistrate order the executioner to *cut off the right hand of a certain thief*, and the executioner wilfully cut off his *left* hand, nothing is incurred [by the executioner,] according to *Haneefa*. The two disciples allege that where the act of the executioner is *intentional*, he is responsible for the hand, but where it is *by mistake*, he incurs no retribution. *Ziffer* says that in a case of *mistake* he is also responsible ; and this is agreeable to analogy. By *mistake* is here meant an *error in judgment* ; in other words, that the executioner supposes or conceives it is equally lawful to cut off the *left* hand, considering the text of the *Koran*, according to which it would appear that *either* may be struck off indifferently, the *right* not being particularly specified. Where, however, the executioner mistakes with respect to the *band* of the thief, saying afterwards “ I supposed this to be the *right* hand,” this is no excuse, since ignorance is not admitted as an excuse in things which are evident. (Some doctors allege that this also is admitted as an excuse.) The argument of *Ziffer* is that the executioner has cut off an hand the amputation of which was not awarded ; and as a mistake which affects an individual is not an object of remission, he is consequently responsible : but to this we reply that the executioner has only been guilty of an error in judgment arising from the text in question not having particularly specified the *right* hand ; and an error in judgment may be forgiven. The argument of the two disciples is that where the executioner acts *intentionally*, he unrighteously and without explanation cuts off a limb the amputation of which is not awarded ;

awarded; and as, in so doing, he commits a wilful and designed injury, he cannot be forgiven, although his act proceed from an error in judgment:—it would appear, also, that *retaliation* is due; yet that is not due, but is even *prohibited*, on account of the doubt respecting his judgment. The argument of *Haneefa* is that, although the executioner has destroyed one limb, yet he has left another limb of the same kind and of greater value, whence this privation cannot be accounted *destruction*; in the same manner as if evidence were given that a person had sold certain effects for an adequate price, and the witness were afterwards to retract from his evidence, in which case nothing lies against the witness, since, although he have destroyed the other's property, yet the proprietor has received an equivalent in return, in consequence of the evidence. Agreeably to this argument of *Haneefa*, it in the same manner follows that, if any *other* than the executioner were thus to cut off the thief's left hand, this other is also free from responsibility: and this is approved.—If the thief reach forth his left hand, and say “This is my right hand,”—and the executioner strike it off, he is not responsible, according to all our doctors, since he here acts by the thief's directions.—It is to be observed that where the executioner *wilfully* cuts off the *left* hand of the thief, the latter is responsible for the value of the property stolen, according to all our doctors:—according to the two disciples, evidently, for as they hold that, in a *wilful* case, the executioner is responsible, the amputation is not, in fact, a *punishment for theft*; and punishment not being inflicted upon the thief, he is responsible for the property stolen, since agreeably to their tenets amputation and responsibility for the property stolen cannot be united:—and according to *Haneefa*, because in his opinion also the amputation of the wrong hand is not the *punishment allotted for theft*; for the reason why he holds that no responsibility attaches to the executioner is *not* because the amputation of that hand is a *punishment for theft*, but because he has, in lieu of that hand, left another more valuable, as has been already stated: and in a case of *error* also, the effect is the same, whence in this case likewise *Haneefa* considers

nor is any
other than the
executioner
responsible
under the
same circum-
stance:

but the thief
is in this case
responsible
for the value
of the property
stolen.

considers the thief as responsible for the property stolen, for one reason, because the amputation of the wrong hand is not, in fact, *punishment for theft*;—but there is another reason why responsibility for the property stolen does *not* lie against the thief, namely, because punishment for theft is inflicted, according to the best of the executioner's judgment, in conformity with the text of the *Koran*, which is *generally* expressed, as has been already stated.

Amputation cannot be awarded, nor executed, but in the presence and at the suit of the injured party.

A DECREE of amputation cannot be passed upon a thief, unless the person from whom the property was stolen be present, and prosecute for the theft, because prosecution is essential to the manifestation of theft; and with respect to this rule, it matters not whether the theft be established by *confession* or by *evidence*, because an offence committed against the property of another can in no way be rendered manifest but by the prosecution of the aggrieved *. This is according to our doctors. *Shafëi* maintains that in case of *confession*, the presence or prosecution of the person robbed are not requisite: it is related, however, in the *Fattabal-Kadoor*, that this was not a tenet of *Shafëi*; but that he held *confession* to be in all respects equal to *evidence*.—It is here to be observed that, according to our doctors, a sentence of amputation cannot be carried into execution unless the person robbed be present, because in punishment *execution* is supplemental to the *Kadze*'s decree.

Cases of theft of a trust, deposit, or so forth.

If a person steal a deposit from the trustee, or usurped property from the usurper, or property usuriouly acquired from the usurer, (as if a person were to take *twenty dirms* in lieu of *ten dirms*, and make seizure of the same, and another were to steal from him *twenty dirms*, including the *ten* so acquired,) these are at liberty to prosecute

* From this it appears that the confession of a thief is not attended with any consequence, unless the person robbed come forward to prosecute.

the thief and to procure the amputation of his hand. In the same manner also, (in the cases of *trust*, or of *usurpation*,) the *proprietor* of the deposit, or of the property usurped, is at liberty to prosecute the thief, and to procure the amputation of his hand. *Ziffer* and *Sbafēi* say that the thief's hand is not to be struck off at the suit of the usurper or the trustee. The same difference of opinion obtains where a person steals property from an *hirer*, or *borrower*, or *Mozdrib*, or a holder of *Bazāt* stock, or a person having possession of property with a view to purchase, or the holder of a pawn,—or from any person in whose hands property lies, and in whom the charge of it is vested, although he be not the actual proprietor, (such as the trustee of a charitable appropriation, or a *father*, or *executor*,)—in all which cases the hand of the thief is also struck off at the suit of the *proprietor* of the property so stolen.—In the case of a *pawn*, however, the thief's hand is not to be struck off at the suit of the pawnholder, unless the property stolen remain with the thief after payment of the pawnholder's debt, because the pawnholder has no right to the property or claim upon it until the debt be paid. It is a rule with *Sbafēi* that the *trustee*, *usurper*, *borrower*, &c. cannot sue for the recovery of the property; and accordingly, that the thief cannot suffer amputation at their suit. *Ziffer* says that as their authority to prosecute, for the recovery of the property, is established, from the necessity of protecting it, they cannot possess the same authority with respect to *amputation*, for if the thief's hand were cut off at their suit, the *protection* of the property would be defeated, since if the property were destroyed whilst in the thief's possession, he would not be responsible for it after having lost his hand, and therefore, if his hand were cut off at their suit, the property no longer remains protected, but is lost to the proprietor. Our doctors say that theft is, *in its own nature*, the occasion of amputation: and amputation, in the cases in question, is established by a decree of the *Kāzee*, issued in consequence of a prosecution which is admitted *generally*, and not from *necessity*; because, as the prosecution of those persons, for the purpose of manifesting the theft, is on account of their wish to recover the property,

their prosecution must be admitted *generally*, in the same manner as that of the *proprietor*: (for, the admission of the prosecution of the *proprietor* for the purpose of manifesting the theft is because he is desirous of recovering the property from the thief, so as that he may be enabled to dispose of it according to his own pleasure;—and the same motive is applicable to the prosecution of the *trustee*, *usurper*, *borrower*, or so forth, since they are also desirous of recovering the property from him, that they may be enabled to dispose of it according to their pleasure; as the borrower or hirer are desirous to recover it, in order to *make use* of it, and the pawner or trustee in order to return it to the owner, and thereby free themselves from the responsibility for it, and from their obligation to the charge of it :) since, therefore, it is evident that their prosecution must be admitted *generally*, in the same manner as that of the proprietor himself, what *Ziffer* alleges falls to the ground. With respect to what he further advances, that “if the thief’s hand were cut off at their suit the *protection* of the property would be defeated,”—we reply that the failure of protection is in this case necessarily involved, since as it appears that their prosecution is the same as that of the actual proprietor, it follows that at their suit the hand of the thief must be cut off; now one consequence of amputation is that the protection of the property ceases; and the failure of this protection, as being a thing necessarily involved, is not to be regarded.

OBJECTION.—Although their prosecution be admitted, yet it would appear that the hand of the thief should not be cut off at their suit, so long as the proprietor is not present, because it is possible that, if he were present, he might declare the thing stolen to be the property of the thief.

REPLY.—This supposition is merely imaginary, and therefore of no weight; in the same manner as a similar imaginary supposition would not be regarded in a case where the *proprietor* was present, and the *borrower* (or other person from whom the property had been stolen) absent; for then the thief’s hand would be cut off at the suit of the proprietor

tor) according to the *Zâbir Rawâyet*,) although it be possible that, if the borrower or other person were present, he might declare that he had given permission to the thief to enter the place of custody where the goods were kept, as this is merely an *imaginary* supposition.

IF the hand of a thief be cut off for stealing any property, and another thief steal the property from this thief, neither the first thief nor the proprietor are competent to prosecute the second thief; because the property is not *appreciable* in respect to the first thief, (whence if it were destroyed in his hands he is not responsible,) and it is not *protected* in respect to the proprietor, (whence, if it had been destroyed in the hands of the first thief, he could not make him responsible;)—the second theft, therefore, does not occasion amputation. There is one tradition, according to which the first thief may take the property back from the second thief, in order to restore it to the proprietor, which it is incumbent upon him to do: but, according to another tradition, the first thief is not at liberty to take back the property from the second thief, as he had not been himself legally possessed of it, since a *legal possession* or *seizin* means a seizin either of *proprietary*, *responsibility*, or *trust*, and the seizin of the first thief is not of any of these descriptions. It is said, in the *Faitabal-Takdeer*, that it is most eligible, in this case, if the proprietor be present, that the *Kâsse* cause the property to be restored to him, or, if not, that he keep it with himself, as a trust, neither restoring it to the *first* thief, nor yet leaving it with the *second*, whose offence is manifest.—If, however, the *second* thief steal the property *before* the infliction of amputation upon the *first* thief, or after the remission of punishment in consequence of some doubt [operating in bar of punishment,] his hand is cut off at the suit of the first thief; because, in this case, the property is appreciable with respect to the first thief, since it would be unappreciable with respect to him only in consequence of amputation; but here amputation has not taken place upon him; he is therefore, in this instance, the same as a *usurper*.

Case of a second thief stealing the property from the first thief.

Restoration of
the property,
before prose-
cution, pre-
vents punish-
ment:

If a thief return the property stolen to the owner, before the latter has commenced any prosecution against him, and the owner then bring his complaint before the magistrate, in this case, (according to the *Zábir Rawáyet*,) the hand of the thief is not struck off. It is recorded from *Aboo Yoozaf* that his hand is to be struck off, on account of the analogy between this and a case where the thief returns the property to the owner, after the accusation. The reason adduced in the *Zábir Rawáyet* is that prosecution is essential to the manifestation of theft; because a theft cannot be made manifest but by evidence; and evidence is adduced only for the purpose of terminating the prosecution; and the *termination* of a prosecution without the *establishment* of a prosecution is inconceivable; it is therefore evident that prosecution is essential to the manifestation of theft. Now, in the case in question, the prosecution is terminated [in other words, is *precluded*,] by the restoration of the property to the owner; as this is the *end* of prosecution, which is obtained by this means; and as that which is essential to the manifestation of theft does not exist in this case, it follows that the theft is not manifested; and the theft not being made manifest, the thief's hand cannot be cut off, since without the manifestation of his theft, a thief cannot suffer amputation. It is otherwise where the thief restores the property after accusation and the production of evidence, for in this case his hand is struck off, because the prosecution has arrived at its completion, and is therefore accounted still to remain, though the thief have restored the goods at the time of inflicting amputation.

and so also, a
gift of the
property by
the owner, to
the thief, af-
ter sentence
has passed
upon him;

If the *Kázee* decree amputation, and the owner of the property stolen then take it, and make a gift of it to the thief, his hand is not struck off; and so likewise, if he *sell* them to the thief. *Ziffer* and *Shaféi* say that the thief is liable to amputation, (and the same is, in one place, recorded from *Aboo Yoozaf*,) because in this case, the theft has been fully established, and it does not appear, from the *gift* or *sale*, that the thief was the proprietor at the time of his stealing the property;

property; wherefore the *gift* or *sale* is not the occasion of doubt.—Our doctors say that *execution* is a supplement to the *Kázee's* decree, in this instance; (because, in the case in question, it is not absolutely necessary that the *Kázee* should say “*I decree in this manner,*” since this is said merely for the purpose of declaring or shewing forth a right, and announcing the same to the claimant of the right; but amputation is a right of God, and is therefore known to the claimant of right, namely God himself, without the *Kázee's* declaration;) it is therefore requisite that prosecution exist at the time of inflicting punishment; and as, in the case in question, no prosecution appears at the time of punishment, it amounts to the same thing as if the owner of the property had constituted the thief a proprietor of it prior to the *Kázee's* decree.

If the value of the property stolen be, by *depreciation*, diminished to *within* the standard of theft, (namely, *ten dirms*,) after sentence and before execution, amputation does not take place. It is recorded from *Mohammed* that amputation is to be inflicted, and such also is the opinion of *Ziffer* and *Sbafii*, they conceiving an analogy between this and a case where a deficiency occurs in the *actual thing* stolen, as if, for instance, a thief had stolen ten *dirms* from some person, and one of them should afterwards be lost or expended,—in which case the thief's hand would notwithstanding be cut off,—and so here likewise.—Our doctors say that the completeness of the standard of theft being a condition of amputation, it is also a condition that the completeness exist at the time of inflicting the punishment, according to what was before said, that “*Execution* is a supplement to the *Kázee's* decree:” contrary to where a deficiency occurs in the *actual article* stolen, for in this case no diminution appears in respect to the *standard of theft*; because responsibility for that article lies against the thief as much as if the whole property stolen were destroyed, whereas no responsibility lies against the thief for a deficiency in the value, by *depreciation*: there is therefore an evident difference between the two cases.

or a depreciation of the property to within the standard of theft.

If,

The thief's plea of property in the article stolen prevents punishment;

If, after witnesses bearing evidence to a theft, the thief plead that the article alleged to have been stolen is his own property, his hand is not to be cut off although he produce no evidence in support of his plea. *Shaf'ei* maintains that the punishment for theft is not remitted upon this plea, because every thief has it in his power to plead that the property stolen is his own,—and hence, if punishment were to be remitted upon such a plea, the door of punishment would be altogether closed. Our doctors say that *doubt* occasions the remission of punishment; and doubt is established upon the plea, since it is possible that it may be true: and with respect to what *Shaf'ei* urges, that “no thief can be at a loss for such a plea,” it is not of any weight, because retraction and denial are admitted after confession, although a person confessing have it always in his power to retract and deny*.

and so likewise, a plea of property made by one of two thieves.

If two persons confess to a theft, and one of them afterwards plead that the property is his, amputation is not inflicted upon either; because the retraction is admitted and approved with respect to the person retracting, and this gives rise to a doubt in regard to the other thief, as the theft is, in the present case, established upon the evidence of both jointly, and hence the act of both is *one* act.

A person jointly concerned with another in a theft may be prosecuted and punished although the other abscond.

If two persons commit a theft, and one of them afterwards abscond, and two witnesses bear evidence to the theft, as committed by *both*, against him who is *present*, his hand is cut off, according to the most recent opinion of *Haneefa*; and such is also the opinion of the two disciples. *Haneefa* was at first of opinion that the hand of the *present* thief should not be cut off, since, if the *absentee* were present, it is possible that he might advance some plea which might occasion doubt. The reason on which the more recent opinion of *Haneefa* is founded

* This reasoning of the *Haneefite* doctors is so exceedingly *absurd* and *unsatisfactory*, that it might perhaps be suspected there is a mistake either in the translation or the text; but the former is *literal*; and all the copies of the latter, both *Persian* and *Arabic*, perfectly coincide: certain it is that the argument of *Shaf'ei* remains altogether unanswered.

is that absence prevents the establishment of theft with respect to the absentee, as a decree of the *Kdax* against an absentee is illegal; therefore the theft of the absentee is, as it were, *non-existent*, and a thing which is non-existent does not give rise to *doubt*; and the mere *apprehension* of the occurrence of a doubt is not regarded, on the grounds before stated.

If a *Mabjoor* slave * make a confession that " he had stolen those " ten *dirms*,"—(there producing them,) his hand is cut off, and the property stolen is returned to the person who had been robbed of it. This is the doctrine of *Haneefa*. *Abou Toofaf* has asserted that his hand is to be cut off, but that the ten *dirms* belong to his master. *Mohammed*, on the other hand, says that his hand is *not* to be cut off, but that the ten *dirms* belong to his master. All this proceeds upon a supposition that the master denies his slave's allegation.—But if this slave confess that " he had stolen certain property, which no longer " exists, but is destroyed," his hand is to be cut off, according to all our doctors as here enumerated.—If, moreover, the slave be a *Maxoon*, his hand is to be cut off, whether the property stolen be remaining or expended. *Ziffer* maintains that the hand of a *Maxoon* is not to be cut off in any of these cases; for it is a tenet of his that the confession of a slave, inducing either punishment or retaliation, is not to be admitted; because, as such confession affects either his *whole person*, or a *part*, and as his person, and every part of it, is the property of his master, his confession is a confession affecting another; and a confession affecting another is not to be received: but yet the *Maxoon* must be constrained to make satisfaction for the property stolen, where it has been destroyed; or, if it be remaining, he must

Cases of confession to a theft by a slave.

* Literally, a *prohibited* slave; that is, one who is incompetent to *buy, sell*, or perform any other act whatever, *on his own behalf*; in opposition to a *Maxoon* or *privileged* slave, who (under certain restrictions,) is at liberty to act for himself.

be desired to restore it ; since his confession is valid with respect to the *property*, as he has been invested, by his master, with power to make confession in matters of property, whereas a *Mahjoor* slave's confession respecting *property* also is not admitted. Our doctors allege that a *Mahjoor*'s confession, inducing punishment, is admitted, as he is a *man**, after which the confession proceeds, dependantly, to affect the property, and thus this confession is valid with respect to the property likewise : a slave moreover cannot be *suspected*, in a case of confession inducing punishment, since his confession induces pain to himself, as his hand is cut off in consequence of it ; and a confession of this nature is admitted although it tend to affect the right of another.—The argument of *Mohammed*, in the case of a *Mahjoor*, is that his confession, as affecting *property*, is null ; (whence his confession with respect to an *usurpation* of property, is not admitted ;) any property, therefore, which is in the hands of the *Mahjoor*, is the property of his master ; and the hand of a slave is not cut off for stealing the property of his master. A circumstance which confirms this doctrine of *Mohammed* is, that the *property* is the *original* thing in a prosecution for theft, and the amputation only a *dependant*, whence a prosecution may be heard respecting the *property*, independent of amputation,—that is, if the proprietor sue for the *property* and not for *punishment*, his suit is heard ;—and so likewise, property is established independent of amputation, where the evidence consists of one man and two women,—or, where the thief makes confession of the theft, and afterwards retracts and denies it :—but if the case were reversed,—that is, if the owner of the property declare “ I am desirous that his hand “ be cut off, and do not want the property,” his suit is not heard ; and in the same manner, amputation cannot be established unless the property be established : it is therefore evident that the *property*, in the case in question, is the *original* thing, and amputation only a *de-*

* And therefore subject to the penalties of the law, in common with other people.

pendant ;

pendant; and the confession of a slave not being valid with respect to that which is the *original*, (namely the *property*,) it necessarily follows that it is not valid with respect to *amputation*, which is only a *dependant* thereof. It is otherwise in the case of a *Mazoon*, as his confession with respect to the property in his hands is valid, and consequently his confession with respect to that which is its dependant (namely amputation) must be valid likewise. The argument of *Abou Roosaf* is that, in the case in question, the *Mahjoor* has made a confession affecting two points; FIRST, *amputation*, (which affects his own *person*, according to what was before observed, that "he is a *man*," and which is consequently valid;) SECONDLY, *property*, (which affects his master, and is consequently invalid with respect to the master:) now amputation may be incurred independent of *property*; as where a free person (for instance) confesses to his having stolen cloth, which is in the hands of *Zeyd*, by saying "I stole this cloth from *Aumroo*," and *Zeyd* asserts the cloth to be his "own property, in which case the hand of the person so confessing is struck off, although his confession be not received in respect to that particular piece of cloth, whence it is not to be taken from *Zeyd*. *Haneefa* says that the confession of a *Mahjoor* slave, where it induces punishment for theft, is valid, (according to what was before stated, that "he is a *man*;")—and his confession must also be valid with respect to the *property*, in consequence of its being so with respect to *punishment*; because the confession is made *after* the perpetration of the theft, and not at the *beginning* of it; and the property, *after* the theft, is a dependant of amputation; whence it is that the protection of that property ceases in consequence of amputation; and also, that amputation is inflicted after the destruction of the property. It is otherwise in the case of confession made by a *freeman*, as before cited; for there *amputation* only is due, but not the restoration of the *property*; because the hand of a thief is to be cut off for stealing property from a *trustee*; and it is here possible that the cloth is the actual property of *Zeyd*, and that the freeman had stolen it from *Aumroo*, in whose hands

it was deposited.—In a case where a slave steals the property of his master his hand is not cut off; whence there is an evident distinction between this case and that of a *freeman*.—This, however, applies solely to where the master of the slave *falsifies* his confession:—for if the master *verifies* his confession, his hand is cut off in all these cases, on account of the dereliction of that which would prevent it, namely, the *right of the master*.

The property stolen must be restored after amputation: but if it be lost or expended, the thief is not responsible.

IF, after amputation being inflicted upon a thief, the actual property stolen yet remain in his possession, it must be restored to the owner, as it still remains within his proprietary: but if the property remain not with the thief, he is not responsible for it, whether it have been *consumed* or *destroyed*. This is the opinion of *Abou Yoosaf* and *Haneefa*, according to one report; and such also is the doctrine of the *Rawdjet Masboor*. *Hasan* records, from *Haneefa*, that satisfaction is due where the property has been *consumed* or *expended*. *Shafei* says that in every case satisfaction is due for the property, and that responsibility for the property does not cease in consequence of amputation, because amputation and satisfaction for the property are both equally *rights*, although the *cause* of each be different; (for amputation is a right of the LAW, the occasion of it being the persons not refraining from the commission of an act which the LAW forbids; and satisfaction for the property is a right of the *individual*, the occasion of it being the *taking away* of the property;) both, therefore, are due; in the same manner as if a person were to destroy game, the property of another, and kept within an inclosure;—or to drink wine, the property of an infidel subject; in the *first* of which instances correction and satisfaction for the property are both incurred; and, in the *second*, punishment for wine-drinking, and satisfaction. The arguments of our doctors upon this point are threefold: *FIRST*, the prophet has said “*No responsibility lies against a thief after amputation*.”—*SECONDLY*, an obligation of responsibility prevents punishment; because if the thief were *responsible* for the property stolen, he would, by making satisfaction

for it, become the proprietor from the time that he had taken it, in the manner of a *succession**, and it would then appear that he had taken *his own* property, whence his punishment would be prevented; but as amputation is held, by all the doctors, to be unavoidably incurred by him, he is not made responsible, since his being made so would prevent it: **THIRDLY**,—the protection of the property ceases at the time of the theft,—that is, it no longer remains in a state of protection on behalf of the individual,—for if it remain protected merely *on behalf of the individual*, it follows that it is *in its own nature* neutral†, and is prohibited‡ only on account of the right of the individual: now this is a prohibition arising from circumstances, and not existing in the thing itself; and as a thing which is in its own nature *neutral* cannot occasion punishment, it would follow that amputation is not to be inflicted upon the thief, on account of the doubt respecting *neutrality*; but as amputation is incurred, according to all the doctors, it necessarily follows that the property, at the time of the theft, becomes prohibited in behalf of the right of the **LAW**, in the same manner as *carrion*; and satisfaction is not due for *carrion*.—The failure (on the other hand) of the protection of the property, with respect to the *consumption* of it, is not *apparent*, as the *consumption* is another matter, distinct from the *theft*, and it is not necessary that the failure of protection be regarded with respect to the *consumption* of the property also.—In the same manner, a doubt concerning neutrality is regarded in the thing which occasions amputation, namely, the *theft*, but not in the thing which is distinct from that,—namely, the *consumption*. Upon this is founded what *Hasan* reports as the doctrine of *Haneefa*, that, “in case of *consumption* satisfaction for the property is due.” The argument advanced in the *Rawdyet Masboor* is that the *consumption* is

* That is, in the manner of a *transition of property*.

† *Arab. Mobäh*, i. e. *common property*, which it is lawful for any one, indifferently, to take and use.

‡ *Arab. Hirän*, in opposition to *Mobäh*.

merely the completion of the *design*, (for the *design*, in stealing the property, is, to *consume* it;) regard, therefore, is paid to the *doubt of neutrality* before-mentioned, and hence satisfaction is not incumbent, since the thief has, as it were, destroyed a *neutral property*.—The protection of the property, moreover, is held to cease with respect to responsibility, in a case of consumption, as the failure of protection in a case of *consumption* is a necessary consequence of its failure in a case of *destruction*;—(in other words, the protection of the property ceases in the present case also, and hence the property is not *in protection* in such a manner that responsibility should be incumbent, any more than in a case of *destruction*;) for it is manifest that if the protection of property were to remain in a case of *consumption* only, and satisfaction for that were made due, the agreement between the property in question, (namely, *the property stolen*) and the property on account of which satisfaction is due, would be destroyed, since [if such were the case] this property is protected on account of the right of the individual, both in the *consumption* and also in the *destruction* of it, inasmuch that if any person were to usurp it, he would be responsible for it, whether it be destroyed, or consumed by the usurper,—whereas the property *in question*, (namely, *the property stolen*;) is protected on account of the right of the individual in a case of *consumption* only; and there is no agreement between property which is protected in *two* situations, and property which is protected in *one* situation only:—but an agreement between the property in question and the property for which satisfaction is required is indispensable: it therefore appears that in a case of *consumption* also the protection of the property ceases; and no satisfaction is due for it;—in the same manner as holds in a case of *destruction*.

One punishment answers to all the previous repetitions of the same offence;

If a person be repeatedly guilty of theft, and then suffer amputation for any particular theft, such amputation takes place as answering to *all* the thefts: and there is no responsibility for the property stolen in any one of them, according to *Hanesfa*. The two disciples

say

say that the thief is responsible for the property stolen in every theft excepting that for which he has suffered amputation.—This is where only *one* of the several owners is present.—If, however, they be *all* present, and the thief suffer amputation at the suit of the *whole*, in this case he is not responsible for any thing to any one of them, according to the united opinion of all the doctors.—The argument of the two disciples is that the owner present is not the deputy of those who are absent; and prosecution by the proprietor is essential to the manifestation of theft; but, in the case in question, prosecution does not appear on the part of those who are *absent*, wherefore the larciny of the thief is not established with respect to *them*; their property, therefore, remains in protection, and hence satisfaction is due for it. The argument of *Haneefa* is that by all the thefts *one* amputation only is incurred as the right of God; because, in punishments, the application is made as extensive as possible,—(that is, one single punishment suffices *.)—Now, as prosecution is conditional to the manifestation of the theft with the *Kāzee*, and as that has taken place, (and punishment for theft is incurred on account of the offence,) so when the *Kāzee* inflicts one single punishment he inflicts the whole that is due; for it is evident that the advantage (namely *determent*) is reaped by all. The single amputation, therefore, takes place as answering to *all* the thefts; and hence satisfaction is not due for any one of the properties stolen. The same difference of opinion obtains in a case where a thief repeatedly steals property from the same person, and that person prosecutes upon one of the thefts, and the thief suffers amputation for it:—that is, according to *Haneefa*, the thief is not responsible for the property stolen in any of the other instances;—but according to the two disciples he is responsible.

and the thief is responsible for the property of all except the *actual* prosecutor.

* In other words, answers to all the previous repetitions of the same offence for which that punishment is inflicted.

C H A P. V.

Of the Acts of a *Thief* with respect to the Property stolen.

Case of a thief
tearing cloth
before he carries it out of
custody.

IF a thief steal a piece of cloth, and tear it in two, in the house of the owner of the cloth, and then take it out of the house, and carry it off, and the value of the cloth, after being thus divided, amount to ten *dirms*, the hand of the thief is to be struck off. It is recorded from *Abou Yoozaf* that his hand is not to be struck off; because, upon his dividing the cloth, a cause of his right of property in it appears, as the tearing of it in pieces* is a cause of right of property, on account of its subjecting him to responsibility for the value; thus the subject of responsibility becomes his property upon his making satisfaction for it to the owner. Where the thief, therefore, conveys the cloth out of the owner's house *after* having divided it, theft is not established, since the thief here conveys out of the house a thing in which a cause of his right of property exists; and in such a case the hand of a thief is not to be cut off; in the same manner as the hand is not cut off where the purchaser of goods steals his purchase in which the seller happens to have a reserve of option, as a cause of property exists in that instance;—and so also in the case in question. *Haneefa*, on the other hand, argues that the taking of the cloth, together with the tearing of it in pieces, is a cause of *responsibility*, but not of *right of property*; for the only principle on which this right is established, *after* making satisfaction, is that if it were not so, the compensation, and the thing for which the compensation is given, would be united in one state of property; and this does not engender doubt, any more than the simple *taking*, without *tearing*: in other words, as the simple *taking away* is also, in some instances, a cause of right of property after satif-

* *Arab. Khak Fajis*; that is, *tearing* so as to destroy or depreciate the value of the article.

faction being made, and yet does not engender doubt, so the taking with the tearing, which is a cause of responsibility, and, after satisfaction being made, becomes a cause of right of property, does not engender doubt. Similar to this is a case where the seller steals from the purchaser damaged goods which he had sold to him; for here his hand is to be cut off, although the cause of returning these goods, and therein, ultimately, the cause of the propriety reverting to the seller, be established; for his hand is cut off notwithstanding; and so likewise in the present case. This is contrary to what is adduced by *Abou Roosaf*, that "if a purchaser steal his purchase in which the seller has a reserve of option, his hand is not to be cut off," &c. since *sale* is employed for the purpose of substantiating the right of property. The difference of opinion here recited obtains only where the owner of the cloth chuses to take it back, together with satisfaction for the damage it has sustained.—If, however, he chuse to quit the cloth, and receive of the thief satisfaction for the *full value*, in this case his hand is not to be cut off, according to all our doctors, because the thief is here considered as the proprietor of that cloth from the time of his taking it, in the manner of succession*, and hence it is the same as if the proprietor were to make a gift of the property stolen to the thief, for there the thief's hand is not to be cut off because of doubt, and so here likewise. All that has been here advanced proceeds upon a supposition that the cloth has, by tearing it, sustained a *considerable* damage; for if the damage be *trifling*, the hand of the thief is cut off, according to all the doctors; because in this case no cause of a right of property appears, since here it is not in the proprietor's power to take the whole value by way of satisfaction.

If a thief lay his hands upon a goat, and cut its throat within the house of the owner, and then convey it forth, his hand is not to be cut off; because in this case the theft is, in the end, a theft of *flesh meat*; and the hand is not cut off for stealing *flesh meat*.

Killing an animal, and then stealing it, does not constitute theft.

* That is in the way of a *transition of property*.

Case of a
thief's con-
version of gold
or silver into
coin.

If a man steal gold or silver, to such an amount as would occasion amputation, and then coin the same into *dirms*, or *deendrs*, his hand is to be cut off, and the *dirms* or *deendrs* are given to the person who had been robbed. This is the doctrine of *Haneefa*. The two disciples say that the person who had been robbed is not entitled to take the *dirms* or *deendrs*. The difference of opinion here originates in a similar difference of opinion in a case of *usurpation*. Thus if a person were to usurp *dirms* or *deendrs*, and afterwards convert them into *ornaments* (such as *bracelets*, for instance) the proprietor's right in them is terminated, according to the two disciples;—contrary to the opinion of *Haneefa*. In the same manner, also, in the case in question, by converting the gold or silver into *dirms* or *deendrs*, the right of the person robbed is terminated, according to the two disciples; contrary to the opinion of *Haneefa*. The reason of this difference of opinion is that workmanship is appreciable, with the two disciples, but not with *Haneefa*. And here observe that, concerning amputation, in the case in question, (judging from the opinion of *Haneefa*,) there can be no manner of demur, because the thief is not *proprietor* of the *dirms* or *deendrs*: but some say that (judging by the opinion of the two disciples) there can be no amputation, because the thief has become proprietor of the coin previous thereto. Some again say that in the opinion of the two disciples also amputation is incurred, because the gold or silver has, by workmanship, become *another thing*, and the slave becomes proprietor of *that thing*, and not of the *actual thing* stolen, (namely, the *gold* or the *silver*;) and hence his hand must be cut off.

Case of a
thief dying the
cloth which
he has stolen.

If a person steal cloth, and dye it *red*, and afterwards suffer amputation for the theft, the cloth is not to be taken back from him; nor is the value to be taken from him by way of satisfaction. This is the doctrine of the two *Elders*. *Mahammed* says that the red cloth is to be taken from him, and he is paid for the expence of dying; in the same manner as where a person *usurps* cloth, and afterwards dyes it,

it, in which case the cloth is taken back from him, and he is paid, by the owner, such additional value as the cloth has received in the dying, for this reason, that the cloth is the *original* article, and is still existing, and the colour is a *dependant* upon it, whence a preference is given to the owner; the cloth is therefore returned to the owner, and the usurper is paid the expence of dying; and so also, in the present case, because here also the same reason exists. The argument of the two *Elders* is that the *colour* is extant both in *appearance*, and also in *reality*, whence, if the owner of the cloth were to take it back *dyled*, he is responsible for the accession of value in consequence of the dying; now the right of the owner of that cloth exists in the *appearance* of that cloth only, and not in the *reality* of it, (namely the *proprietary*,) because, if the cloth were destroyed, the thief is not responsible; and such being the case, a preference is given to the thief. It is otherwise in a case of *usurpation*, since in that instance the right of the proprietor and also of the usurper is extant and established both in *appearance* and in *reality*, for which reason they are both upon a footing, whence a preference is given to the proprietor for the same reason as *Mohammed* gives the preference to him. What is now advanced applies solely to where the thief has procured the cloth to be dyed of a *red* colour: but if he were to get it dyed *black*, the cloth is taken from him, according to *Haneefa* and *Mohammed*. *Abou Yoosaf* conceives this case to be the same with the preceding, because he holds a *black* dye also to increase the value of the cloth, in the same manner as a *red* dye. With *Mohammed*, likewise, *black* is the same as *red*; yet that does not occasion a termination of the proprietor's right, he being entitled to take back the cloth in either case. With *Haneefa*, on the contrary, *black* is in reality a *defect* in the cloth, and therefore does not occasion a termination of the proprietor's right.

C H A P. VI.

Of *Katta-al-Tareek*, or *Highway Robbery*.

Description
of what con-
stitutes a high-
way robber.

WHEN a party go forth, prepared for opposition, (that is, enabled to repel the opposition of others,)—or, when a single person goes forth, ready for opposition, from a confidence in his own prowess,—with an intent to commit depredations on the highway, they are termed, in the *Arabick* language, *Kattaa-al-Tareek**, and in the *Persian*, *Rab-Zin*; and the person upon whom a robbery is so committed is termed *Maktoo-ali-bee*†.

Robbers are
of four de-
scriptions,

and punish-
able by im-
prisonment,

or, by ampu-
tation of the
right hand
and left foot,

HIGHWAY ROBBERS appear under four different descriptions or predicaments. FIRST, those who are seized before they have robbed or murdered any person, or put any person in fear: SECONDLY, those who are seized after having only *robbed* a *Mussulman* or an infidel subject:—THIRDLY, those who are seized after having committed *murder* only without *robbing*: and FOURTHLY, those who are seized after having committed both *murder* and *robbery*. The law with respect to these in the *first* predicament is that the magistrate shall confine them in prison until their repentance be evident,—(that is, until it be known from their demeanor that they have repented, by the marks of repentance and contrition appearing in their countenances.) With respect to those in the *second* predicament, the law is that the magistrate shall strike off their right hand and left foot, provided the property taken be of such value as when divided amongst the whole, would afford to each to the amount of ten *dirms*. (The *right*

* Literally, "Infesters of the highway."

† Literally, the depredator.

hand and *left* foot are here particularly specified, because, if the hand and foot were both taken from *one side*, one of the faculties would be totally destroyed, which amounts to *killing*, and the law does not award robbers of this description to be put to death.) With respect to those in the *third* predicament, the law is that the *Kâzee* shall put them to death *, by way of *punishment*; whence, if the *Wallee-od-dam* or avenger of blood forgive them, no regard is paid to his forgiveness, *punishment* being a right of God †. (The rule with respect to those three descriptions is founded on a text of the *Koran*, as the passage which occurs upon this head evidently points to the rules here specified. Let it also be observed that the intent of the words “after having robbed a *Mussulman* or an *infidel subject*,”—is that the property may appear protected under a *lasting* protection ‡: if, therefore, a robber take the property of an *alien*, in the way of *highway robbery*, amputation of the hand and foot is not to be inflicted upon him.) The law with respect to these in the *fourth* predicament is that the magistrate has it in his option to punish them in which ever way he sees best: if he please, he may first cut off a hand and foot and then put them to death, or crucify them; or, if he please, he may put them to death at once, without inflicting amputation. *Mohammed* holds that the magistrate has it at his choice either to put them immediately to death, or to crucify them; but that he is not at liberty to inflict amputation upon them *likewise*; because highway robbery is a single offence, and therefore cannot occasion two punishments; and also because, in *punishment*, robbery *without* violence to the person is included in the *murder* of the person, (whence it is that if a thief, being married, were

or by death:

or by crucifixion, or immediate death, with or without amputation, at the discretion of the magistrate.

* Executed either by *hanging* or *beheading*.

† In opposition to *retaliation*, which being a right of the *individual*, may either be forgiven, or remitted for a composition.

‡ In opposition to the property of an *alien*, which is in *protection* only during his *Amia*, (or *protection* under which aliens are permitted to remain in a *Mussulman* territory for the space of one year.)

to commit *whoredom* he suffers *lapidation* only, and not *amputation*.) The argument of *Haneefa* and *Abou Yoosaf* is that the infliction in question (namely death or crucifixion, together with amputation,) is only a *single punishment*, more severe than ordinary, on account of the superior atrocity of its cause, (namely, *a complete obstruction of the peace of the highway, by murdering a person, and then carrying off his property*,)—whence it is that cutting off the right hand and left foot constitutes only a *single punishment* with respect to a highway robber, whereas, with respect to a *common thief*, who is not a *highway robber*, it would be *two* punishments; and a variety of crimes can only be comprehended in a *numerous*, but not in a *single* punishment. It is to be observed that *Kadooree*, in his abridgement of his own work, has mentioned that it is in the option of the magistrate either to expose the body upon a cross, after putting to death the robber, or to leave it. It is recorded from *Abou Yoosaf* that the body must not be left uncrucified, because *crucifixion* is particularly mentioned in the sacred writings, and the design of it is *publicity*, in order that others may take warning by it. Lawyers report, from *Haneefa*, that *publicity* is fully obtained by *putting to death*, the *crucifixion* being only by way of aggravation, wherefore the magistrate has it in his option either to aggravate or not. Again, *Kadooree* says that the highway robber in question is to be crucified *alive*, and then to be slain by thrusting a spear through his body: and the same is recorded from *Koorakbee*. It is recorded from *Tebavee* that he must first be slain and then crucified; but the preceding opinion [of *Koorakbee*] is most approved, because crucifying in the way there mentioned is calculated to excite men's tears most forcibly, which is the design. It is also requisite that the body of the criminal be not suffered to remain longer than *three days* upon the cross, because by that time it becomes putrid and consequently noxious. *Abou Yoosaf* says that it ought to remain there until it fall to pieces, for the more striking example: to this, however, it may be replied that the example is sufficiently made by an exposure of *three days*.

If a highway robber be put to death, satisfaction for the property he had taken is not due from him, because of the analogy which this bears to *theft*, in which the same rule obtains, as has been already stated.

Satisfaction for the property taken not due in case of *punishment*.

If any one among a band of robbers be guilty of *murder*, the punishment for it is inflicted upon the *whole*, because the punishment is in this instance considered as a penalty for the assault of *the whole*, which is established by each of them being aiding and abetting to the other; (whence if any of them, in fighting, be hard pressed, the others assist him;) and the condition upon which the punishment is inflicted on them is this, that murder be committed by *any one* of them, which is the case here. Let it also be observed that it is the same whether the murder be committed with a *club*, a *stone*, or a *scymitar*, because *highway robbery* is equally established in all these cases.

Murder committed by any one of a band of robbers subjects the whole to the penalty of murder.

If a robber be taken who has neither *murdered* nor *plundered*, but only *wounded* a person or persons, in this case retaliation is exacted of him, where there is retaliation*, or a fine, where there is fine†. —The exaction of retaliation or fine is committed to those who are entitled to claim it, because in the offence in question there is no *punishment*, whence it is evident that these are a right of the *individual*, and hence *he* is to exact it to whom the right appertains, namely, the *Walee Jandiyat* or person upon whom the offence has been committed.

Wounding, unattended with *murder* or *robbery*, subjects to *retaliation* or *fine*;

If a robber be seized who has both *plundered* and *wounded* any person or persons, his hand and foot are to be cut off; but the personal injury sustained from him is remitted, (that is, neither *fine* nor *retaliation* are incurred;)—because, where *punishment* is incurred *as a right of*

but not if attended with *robbery*, followed by *amputation*

* As in case of the loss of any *limb* or *organ*.

† As in case of *cuts* or *bruises*.

God, the protection, in behalf of the individual, of every thing short of the *whole person*, ceases in the same manner as the protection of *property* ceases.

A robber, repenting before he is seized, is not liable to punishment; but the avenger of the offence is at liberty to exact retaliation; or, if he forgive, the robber is responsible for the value of the articles taken.

If a robber be taken after having repented, and he should have been guilty of both *robbery* and *murder*, in this case the *Walee Janayet* or avenger of the offence has it in his option either to slay him, in retaliation, or to forgive him; because, in the offence of highway robbery, punishment is not to be awarded after repentance, according to what is written in the *Koran*, "PUNISHMENT SHALL BE INFLICTED UPON THEM, EXCEPTING SUCH AS REPENT BEFORE THE MAGISTRATE LAYS HIS HANDS UPON THEM;" and also, because repentance only can be confirmed by the robber returning the goods he had taken to their proper owner; in which case amputation is not incurred*: but amputation not being incurred, it necessarily follows that the right of the *individual* holds in respect both to *persons* and *property*: the avenger of the offence is therefore at liberty either to exact retaliation or to forgive; and if he forgive, the robber remains responsible for the property taken, whether it be destroyed in his hands, or consumed by him.

The actual perpetrator being an *infant* or *lunatic* screens all the party from punishment.

If, among a party of robbers, there happen to be an *infant* or a *lunatic*, or a prohibited relation of the person robbed, in this case punishment is remitted, not only with respect to this person, but also with respect to all the rest of the party. What is now advanced concerning an *infant* and *lunatic* is the opinion of *Haneefa* and *Ziffer*. It is recorded from *Aboo Yoofoof* that this rule obtains only where the infant, or the lunatic, is the actual perpetrator of the murder or robbery: but if the actual perpetrator be of mature age and sound understanding, in this case punishment is inflicted upon the rest of the party also, although there be an infant or a lunatic among them;—but yet punishment is not inflicted upon the infant or the lunatic. The same difference of

opinion obtains in a case of theft committed by a party, of whom some are infants or lunatics;—that is, (according to *Haneefa* and *Ziffer*,) punishment is remitted with respect to the whole. The rule is the same with *Aboo Yoosaf* likewise,—provided that only the *lunatics* or *infants* carry forth the property out of the owner's house, and not the *others*; but if the *reverse* be the case, punishment is not remitted with respect to such of the party as are *sane* or *adult*. The argument of *Aboo Yoosaf* is that the perpetrator is a *principal*, and the assistant a *dependant* only: now where the perpetrator is possessed of understanding, there can be no demur respecting the *principal*; nor, in fact, can any demur exist but with respect to the *dependant*; and that is not regarded: but if the case be reversed, punishment is remitted in respect to the *whole*, because here the demur concerns the *principal*.—The argument of *Haneefa* and *Ziffer* is that *highway-robbery* is a single offence, committed by the whole of the party, and that is the cause of the punishment; but where it happens that the act of *some* of them is not an occasion of punishment, the act of the others is then only a *part* of the cause, and an effect cannot be established by a *part* of a cause; in the same manner as where two persons kill a man by one of them striking him *wilfully*, and the other *accidentally*, in which case retaliation does not take place; as the act of the person who struck *wilfully* is only a *part* of the cause; and so in this case likewise.—With respect to the words “or a *prohibited relation* of the person robbed,”—some observe that this description applies solely to a case where the property may be held in common between such prohibited relation and the person robbed*; whilst others maintain that the application is general, and not restricted to this particular case; and this is approved, because highway-robbery is a single offence, committed by the whole, and hence a prevention of punishment in respect to any *any one* of them occasions the prevention of it in respect to the *remainder*.

* Such as between a *father* and *son*. (See *Imbifat*.)

OBJECTION.

OBJECTION.—Highway robbery committed on a *Mooslāmin** is is not an occasion of punishment any more than where it is committed upon a prohibited relation; and as the circumstance of a prohibited relation being of a caravan robbed would occasion the remission of punishment, it would also follow that the circumstance of a *Mooslāmin* being in the same caravan is likewise an occasion of punishment being remitted: this, however, is not the case, as by the commission of a robbery upon a caravan punishment is incurred, although there be a *Mooslāmin* along with it.

REPLY.—Highway robbery committed on a *Mooslāmin* is not an occasion of punishment, because of a doubt existing with respect to the protection of his life and property: but this reason is restricted peculiarly to a *Mooslāmin*.—It is otherwise where a prohibited relation happens to be in the caravan; since, from his being there, a doubt arises respecting the *custody*, as a whole *caravan* constitutes one single custody, in the same manner as a single *house*, and hence by taking property from the caravan punishment is not incurred; in the same manner as where a person steals the property of his relation, and also the property of a stranger, from a house in which the relation and stranger reside together; in which case his hand is not cut off, on account of a doubt respecting the *custody*; and so here likewise. As punishment, however, in the case under consideration, is remitted, it follows that the right of the individual takes place, according to what was before stated; and hence, if the robber should have committed murder, the avengers of the offence have it in their option either to put the murderer to death, or to forgive him.

Robbery
committed by

If some of the travellers in a caravan commit a robbery upon others

* An alien infidel, who, not being a fixed resident of the *Mussulman* government, has yet a temporary protection from it, (never exceeding the space of *one year*,) either as a fugitive from his own nation, or as a merchant, or as having been deputed on a particular commission. (They are particularly treated of in the next book.)

of

of the same caravan, punishment is not incurred by them; because a caravan constitutes a single custody, like a single house; and as, if one of two persons living in the same house were to steal property belonging to the other out of that house, punishment for theft is not to be inflicted upon him, so here likewise.

If a person commit a highway-robbery by *night*,—or by *day* within a *city*, or in *Koofa*, or *Heera**,—this person is not accounted a *robber*, on a favourable construction.—Analogy would require that he be considered as a *robber*, (and such is the opinion of *Shafëi*,) because an intention of *robbery* here evidently appears.—It is recorded from *Abou Roofaf* that punishment is incurred by him where he commits a robbery *without* the precincts of the city, although it be in the neighbourhood of it, because there no assistance can be had: and he further asserts that if robbers make an affray in the city, during the day-time, with deadly weapons,—or if they make an affray during the *night*, either with deadly weapons, or with sticks and stones,—they are to be accounted as *highway-robbers*, because *deadly* weapons are too quick in their effect to admit of assistance coming, and in the night-time assistance comes slowly.—The reason for a more favourable construction of the fact here is, that highway-robbery signifies *attacking people upon the highway*, which does not apply to *cities*, or inhabited places in their vicinity, because it is evident that in such places assistance may be procured; the persons in question, therefore, are not *highway-robbers*, and hence punishment is not inflicted upon them.—They must, however, be constrained to make restitution of the property taken, in such a manner that the claimant may obtain his right: and they are also to be corrected and imprisoned, as they have committed an offence. If, moreover, they have slain any person, prosecution for

A robbery committed by *night*, (or by *day* within an inhabited place,) does not occasion punishment;

but the thieves are accountable for the property they take, as well as for any violence they

* *Heera* means, generally, any inclosure.—In the present case it is said to allude to a particular *Manzil*, (or resting place for travellers,) near *Koofa*, constructed by *Namân Bin Mander*, in which the lodges, although not *touching*, are yet all *near* each other.

may have
committed.

that is committed to the avenger of blood for the reasons before stated.—It is to be observed, however, that decrees have passed according to the opinion of *Abou Ysof*, as appears in the *Fattahal-Takdeer*, copied from *Tabávee*.

Case of ho-
micide upon
provocation.

If a person provoke another to such a degree that he slays him, the *Deyit*, or fine of blood, falls upon the tribe of the slayer, according to *Haneefa*.—(This is a case of *homicide upon provocation*, which will be hereafter more fully treated of under the head of *Deyit*.)—If, however, a man *repeatedly* act thus, he must be put to death for it, as he is a common nuisance in the land of God, wherefore his iniquity must be removed by destroying him.

H E D A Y A.

B O O K IX.

AL SEYIR, or the INSTITUTES.

S EYIR is the plural of *Seerit*, which, in its primitive sense, signifies *regulation*, in matters spiritual and temporal.—*Seyir*, in the language of the LAW, more especially applies to the institutes of the *prophet* in his wars. Definition of *Seyir*.

Chap. I. Introductory.

Chap. II. Of the manner of waging war.

Chap. III. Of making peace, and concerning the persons to whom it is lawful to grant protection.

Chap. IV. Of Plunder, and the division thereof.

Chap. V. Of the Conquests of Infidels.

Chap. VI. Of the Laws concerning *Mooslamins*.

Chap. VII. Of *Tithe* and *Tribute*.

Chap. VIII. Of *Jizyat*, or Capitation Tax.

Chap. IX. Of the Laws concerning Apostates.

Chap. X. Of the Laws concerning Rebels.

C H A P. I.

War must be carried on against the infidels, at all times, by some party of the *Mussulmans*.

THE sacred injunction concerning war* is sufficiently observed when it is carried on by any one *party* or *tribe* of *Mussulmans*; and it is then no longer of any force with respect to the rest. It is established as a divine ordinance, by the word of God, who has said, in the *Koran*, "SLAY THE INFIDELS †; and also by a saying of the prophet, "*war is permanently established until the day of judgment*," (meaning the ordinance respecting war.) The observance, however, in the degree above mentioned suffices; because *war* is not a *positive* injunction ‡, as it is, in its nature, murderous and destructive, and is *enjoined* only for the purpose of advancing the true faith, or repelling evil from the

* Meaning the *Jibbd Farz*, or *ordained* war, enjoined, in various passages of the *Koran*, to be waged against infidels. It is termed, by some, the *HOLY war*.

† Arab. *Moosbarikun*; literally, *afficiators*; i. e. *polytheists*, or *idolaters*.

‡ Arab. *Farz Ain*. This is a technical expression which cannot well be translated: it means an injunction or ordinance unconditional in its nature, and general in its application; and the obligation of which extends alike to every individual. Thus *fasting* and *prayer* are of the class of *Farz Ain*: in opposition to such duties as are merely *conditional* and *occasional*.

Servants

servants of G^{OD}; and when this end is answered by any single tribe or party of *Mussulmans* making war, the obligation is no longer binding upon the rest; in the same manner as in the prayers for the dead*; (if, however, no one *Mussulman* were to make war, the whole of the *Mussulmans* would incur the criminality of neglecting it;) and also, because, if the injunction were *positive*, the whole of the *Mussulmans* must consequently engage in war, in which case the materials for war (such as *horses*, *armour*, and so forth) could not be procured.—Thus it appears that the observance of war, as aforesaid, suffices, except where there is a *general summons*, (that is, where the infidels invade a *Mussulman* territory, and the *Imám* for the time being issues a general proclamation, requiring all persons to stand forth to fight,) for in this case war becomes a positive injunction with respect to the whole of the inhabitants, whether *men* or *women*, and whether the *Imám* be a *just* or an *unjust* person: and if the people of that territory be unable to repulse the infidels, then war becomes a positive injunction with respect to all in that neighbourhood; and if these also do not suffice, it then becomes a positive injunction with respect to the next neighbours; and in the same manner, with respect to all the *Mussulmans*, from *east* to *west*.

THE destruction of the sword † is incurred by infidels, although they be not the first aggressors, as appears from various passages in the sacred writings which are generally received to this effect.

Infidels may be attacked without provocation.

IT is not incumbent upon *infants* to make war, as they are objects of compassion: neither is it incumbent upon *slaves*, or *women*, as the right of the master or of the husband have precedence: nor is it so upon the *blind*, the *maimed*, or the *decrepid*, as such are incapable.

War is not a duty required of *infants*.

* All *Mussulmans* are directed to pray for the dead: but the injunction is sufficiently fulfilled by the act of the *Imám*, or the relations or *Maulas* of the deceased.

† Arab. *Kattál*; meaning war in its operation, such as *fighting*, *slaying*, &c.

If,

women, or
slaves,
unless in case
of invasion,
&c.

If, however, the infidels make an attack upon a city or territory, in this case the repulsion of them is incumbent upon *all Mussulmans*, inasmuch that a wife may go forth without the consent of her husband, and a slave without the leave of his master, because war then becomes a *positive injunction*, and possession either by bondage or by marriage cannot come in competition with a *positive injunction*,—as in *prayer* (for instance) or *fasting*.—This is supposing a *general summons*; for, before that, it is not lawful for a woman or slave to go forth to make war without the consent of the husband or master, as there is, in this case, no necessity for their assistance, since others suffice; and hence no reason exists for destroying the right of the husband or master on that account.

No extraordinary exactions must be levied, whilst there are any funds in the treasury.

If there be any fund in the public treasury, so long as the fund lasts, any extraordinary exactions* for the support of the warriors is abominable; because such exaction resembles a *hire* for that which is a *service of God*, as much as *prayer* or *fasting*; and hire being forbidden in these instances, so is it in that which resembles them.—In this case, moreover, there is no occasion for any extraordinary exaction, since the funds of the public treasury are prepared to answer all emergencies of the *Mussulmans*, such as *war*, and so forth. If, however, there be no funds in the public treasury, in this case the *Imāms* need not hesitate to levy contributions for the better support of the warriors; because, in levying a contribution, the greater evil (namely, the destruction of the person) is repelled; and the contribution is the smaller evil; and the imposition of a *smaller* evil, to remedy a *greater*, is of no consequence. A confirmation of this is found in what is related of the prophet, that he took various articles of armour, and so forth, from *Sifwan* and *Omar*: in the same manner, also, he took property from married men, and bestowed it upon

* Arab. *Yaal*; meaning an extraordinary donation or reward.

the unmarried, in order to encourage them, and enable them to go forth to fight with cheerfulness;—and he also used to take the horses from those who remained at home, and bestowed them upon those who went forth to fight, on foot.

C H A P. II.

Of the Manner of Waging War.

WHEN the *Mussulmans* enter the enemy's country, and besiege the cities or strong holds of the infidels, it is necessary to invite them to embrace the faith, because *Ibn Abbas* relates of the prophet that " he never destroyed any without previously inviting them to embrace the faith." If, therefore, they embrace the faith, it is unnecessary to war with them, because that which was the design of the war is then obtained without war. The prophet, moreover, has said " *we are directed to make war upon men until such time as they shall confess THERE IS NO GOD BUT ONE GOD; but when they repeat this creed, their persons and properties are in protection.*"—If they do not accept the call to the faith, they must then be called upon to pay *Jizyât*, or capitation-tax *; because the prophet directed the commander of his armies so to do; and also, because by submitting to this tax, war is forbidden and terminated, upon the authority of the *Koran*. (This call to pay capitation tax, however, respects only those from whom the

Infidels must be first called upon to embrace the faith;

and, if they refuse the faith, to pay tribute.

* 'Tribute from the *person*, in the same manner as *Kbiräj* is tribute from *lands*.

capitation-tax is acceptable; for as to apostates and the idolaters of Arabia, to call upon them to pay the tax is useless, since nothing is accepted from them but embracing the faith, as it is thus commanded in the *Koran*.)—If those who are called upon to pay capitation-tax consent to do so, they then become entitled to the same protection, and subject to the same rules as *Mussulmans*, because *Alee* has declared “*Infidels agree to a capitation-tax only in order to render their blood the same as Mussulman blood, and their property the same as Mussulman property.*”

Infidels must be called to the faith, previous to making war upon them:

It is not lawful to make war upon any people who have never before been called to the faith, without previously requiring them to embrace it; because the prophet so instructed his commanders, directing them “*to call the INFIDELS to the faith;*” and also, because the people will hence perceive that they are attacked for the sake of *religion*, and not for the sake of *taking their property, or making slaves of their children*, and on this consideration it is possible that they may be induced to agree to the call, in order to save themselves from the troubles of war.

but if infidels be attacked and slain without this observance, no fine, &c. is due.

If a *Mussulman* attack infidels without previously calling them to the faith, he is an offender, because this is forbidden: but yet, if he do attack them before thus inviting them, and slay them, and take their property, neither *fine, expiation, or atonement* are due, because that which protects, (namely, *Islam*,) does not exist in them, nor are they under protection by *place*, (namely, the *Mussulman territory*,) and the mere *prohibition* of the act is not sufficient to sanction the exaction either of fine, or of atonement for property: in the same manner as the slaying of the *women or infant children* of infidels is forbidden; but if, notwithstanding, a person were to slay such, he is not liable to a fine.

It is laudable to call to the faith a people to whom a call has already

already come, in order that they may have the more full and ample warning: but yet this is not *incumbent*, as it appears in the *Nakl-Sabeeb* that the prophet plundered and despoiled the tribe of *Mooslick* by surprise; and he also agreed, with *Asma*, to make a predatory attack upon *Cobna* at an early hour, and then to set it on fire; and such attacks are not preceded by a *call*. '*Cobna* is a place in *Syria*:—some assert it is the name of a *tribe*.)

If the infidels, upon receiving the call, neither consent to it, nor agree to pay capitation-tax, it is then incumbent on the *Mussulmans* to call upon God for assistance, and to make war upon them; because God is the assistant of these who serve him, and the destroyer of his enemies, the infidels; and it is necessary to implore his aid upon every occasion; the prophet, moreover, commands us so to do.—And having so done, the *Mussulmans* must then, with God's assistance, attack the infidels with all manner of warlike engines, (as the prophet did by the people of *Tayef*,) and must also set fire to their habitations, (in the same manner as the prophet fired *Bawerra*,) and must inundate them with water, and tear up their plantations, and tread down their grain; because by these means they will become weakened, and their resolution will fail, and their force be broken; these means are, therefore, all sanctified by the LAW.

On infidels refusing either to embrace the faith, or to pay tribute, they may be attacked.

It is no objection to shooting arrows, or other missiles, against the infidels, that there may chance to be among them a *Mussulman* in the way either of *bondage* or of *traffic*; because the shooting of arrows and so forth among the infidels remedies a *general* evil, in the repulsion thereof from the whole body of *Mussulmans*; whereas the slaying of a *Mussulman* slave or trader is only a *particular* evil; and to repel a *general* evil a *particular* evil must be adopted; and also, because it seldom happens that the strong holds of the infidels are destitute of *Mussulmans*, since it is most probable that there are *Mussulmans* residing in them, either in the way of *bondage* or of *traffic*;

The use of missile weapons is allowable, although there be *Mussulmans* among the infidels;

and hence, if the use of *missile weapons* were prohibited on account of these *Mussulmans*, war would be obstructed.

or, although the infidels place *Mussulman* children or captives before them, as shields, in fight.

If the infidels, in time of battle, should make shields of *Mussulman* children, or of *Mussulmans* who are prisoners in their hands, yet there is no occasion, on that account, to refrain from the use of missile weapons, for the reason already mentioned. It is requisite, however, that the *Mussulmans*, in using such weapons, aim at the *infidels*, and not at the *children* or the *Mussulman captives*; because, as it is impossible, in shooting, to distinguish precisely between them and the infidels, the person who discharges the weapon must make this distinction in his *intention* and *design*, by *aiming* at the *infidels*, and not at the *others*, since thus much is practicable, and the distinction must be made as far as is practicable. There is also neither *fine* nor *expiation* upon the warriors on account of such of their arrows or other missiles as happen to hit the children or the *Mussulmans*, because the war is in observance of a divine ordinance, and atonement is not due for any thing which may happen in the fulfilment of a divine ordinance, for otherwise men would neglect the fulfilment of the ordinance from an apprehension of becoming liable to atonement. It is otherwise in the case of a person eating the bread of another when perishing for hunger, as in that instance atonement is due although eating the bread of other people, in such a situation be a divine ordinance*; because a person perishing for hunger will not refrain from eating the provision of another, from the apprehension of atonement, since his life depends upon it; whereas *war* is attended with trouble, and dangerous to life; whence men would be deterred, by apprehension of atonement, from engaging in it.

Warriors may carry their *Korans* or wo-

THERE is no objection to the warriors carrying their *Korans* and their women along with them, where the *Mussulman* force is confi-

* That is to say, is enjoined and authorized in the *sacred writings*.

derable,

derable, to such a degree as to afford a protection from the enemy, and not to admit of any apprehension from them, because in that case safety is most probable, and a thing which is *most probable* stands and is accounted as a thing *certain*.

men into the
field along
with them,

If the force of the warriors be small, (such as is termed a *Sirreeyat**,) so as not to afford security from the enemy, in this case their carrying their women or *Korans* along with them is reprobated; because, in such a situation, taking those with them is exposing them to dishonour; and taking the *Koran* with them, in particular, is exposing it to contempt, since infidels scoff at the *Koran* with a view of insulting the *Mussulmans*; and this is the true meaning of the saying of the prophet “*Carry not the KORAN along with you into the territory of the enemy,*” (that is, of the *infidels*.)

unless the
force be so
small as not
to place them
in security.

If a *Mussulman* go into an infidel camp, under a protection, there is no objection to his taking his *Koran* along with him, provided these infidels be such as observe their engagements, because from these no violence is to be apprehended.

It is lawful for aged women to accompany an army, for the performance of such business as suits them, such as dressing victuals, administering water, and preparing medicines for the sick and wounded;—but with respect to *young* women, it is better that they stay at home, as this may prevent perplexity or disturbance. The women, however, must not engage in fight, as this argues *weakness* in the *Mussulmans*; women, therefore, must not take any personal concern in battle unless in a case of *absolute necessity*: and it is not laudable to carry *young* women along with the army, either for the purpose of carnal gratification, or for service: if, however, the necessity be *very urgent*, *female slaves* may be taken, but not *wives*.

Aged women
may accom-
pany the
army, but not
young women.

* A cohort; a body of men from 300 to 500.

*Wives or slaves
must not fight
without leave.*

A WIFE must not engage in fight but with the consent of her husband, nor a slave, but with the consent of his owner, (according to what was already stated, that "the right of the husband and the master has precedence,") unless from necessity, where an attack is made by the enemy.

*Treaties must
not be broken,
&c.*

It does not become *Mussulmans* to break treaties, or to act unfairly with respect to plunder, or to disfigure people (by cutting off their ears and noses, and so forth;) for as to what is related of the prophet, that he disfigured the *Oorneans*, it is abrogated by subsequent prohibitions.—(The history of the *Oorneans* is this. A party of the inhabitants of *Oorna* came to *Medina*, and there took oaths [of fidelity] to the prophet, and afterwards fell sick, upon which the prophet sent them to his camel stables, directing them to live upon camel's milk; but when they recovered they slew the camel-keepers, and carried off the camels; and the prophet dispatched people after them by night, who overtook them, and cut off their ears and noses by the prophet's order.)—In the same manner, it does not become *Mussulmans* to slay women or children, or men aged, bed-ridden, or blind, because *opposition* and *fighting* are the only occasions which make slaughter allowable, (according to our doctors;) and such persons are incapable of these. For the same reason also, the *paralytic* are not to be slain, nor those who are dismembered of the right hand, or of the right hand and left-foot. *Shafei* maintains that aged men, or persons bed-ridden or blind may be slain; because (according to him) *infidelity* is an occasion of slaughter being allowable; and this appears in these persons. What was before observed, however, that "the *paralytic* or *dismembered* are not to be slain," is in proof against him, as *infidelity* appears in these also, yet still they are not slain, whence it is evident that mere *infidelity* is not a justifiable occasion of slaughter. The prophet, moreover, forbade the slaying of *infants* or *single persons**; and once, when the prophet saw a woman who was

*Women, children, or disabled persons,
must not be slain;*

* *Arab. Zirrât; meaning scattered about at random.*

slain,

slain, he said, “ *Alas! this woman did not fight: why, therefore, was she slain?*”—But yet, if any of these persons be killed in war, or if a woman be a *queen* or *chief*, in this case it is allowable to slay them, they being qualified to molest the servants of God.—So also, if such persons as the above should *attempt* to fight, they may be slain, for the purpose of removing evil, and because fighting renders slaying allowable.

unless they be in a situation to annoy the *Mussulmans*.

A LUNATIC must not be slain unless he fight, as such a person is not responsible for his faith: but yet where he is found fighting it is necessary to slay him, for the removal of evil. It is also to be observed that infants or lunatics may be slain so long as they are actually engaged in fight, but it is not allowed to kill them after they are taken prisoners: contrary to the case of *others*, who may be slain even after they are taken, as they are liable to punishment, because they are responsible for their faith.

Lunatics must not be slain unless they fight.

A PERSON who is insane *occasionally*, stands, during his lucid intervals, in the same predicament as a *sane* person.

It is abominable in a *Mussulman* to *begin* fighting with his father who happens to be among the infidels; nor must he slay him; because God has said, in the *Koran*, “ HONOUR THY FATHER AND THY MOTHER;” and also, because the preservation of the father’s life is incumbent upon the son, according to *all* the doctors; and the permission to *fight* with him would be repugnant to that sentiment. If, also, the son should find the father, he must not slay him *himself*, but must hold him in view until some other come and slay him, for thus the end is answered without the son slaying his father, which is an offence. If, however, the father attempt to slay the son, inasmuch that the son is unable to repel him but by killing him, in this case the son need not hesitate to slay him; because the design of the son is merely to *repel* him, which is lawful; for if a *Mussul-*

A *Mussulman* must not fight with his father.

nor slay him, but in *self-defence*.

man

man were to draw his sword with a design of killing his son, in such a way as that the son is unable to repel him but by killing him, it is then lawful for the son to slay his father, because his design is merely *repulsion*; in a case therefore where the father is an *infidel*, and attempts to slay his son, it is lawful for the son to slay the father in self-defence, *a fortiori*.

C H A P. III.

Of making Peace; and concerning the Persons to whom it is lawful to grant Protection.

Peace may be made, where it is advisable:

IF the *Imám* make peace with aliens*, or with any particular tribe or body of them, and perceive it to be eligible for the *Mussulmans*, there need be no hesitation; because it is said, in the *Koran*, “ IF THE INFIDELS BE INCLINED TO PEACE, DO YE LIKEWISE “ CONSENT THERETO;”—and also, because the prophet, in the year of the punishment of *Eubæa*, made a peace between the *Mussulmans* and the people of *Mecca* for the space of *ten years*, *peace*, moreover, is *war* in effect, where the interest of the *Mussulmans* requires it, since the design of war is the removal of evil, and this is obtained by means of peace: contrary to where peace is *not* to the interest of the *Mussulmans*, for it is not, in that case, lawful, as this would be abandoning war both *apparently*, and *in effect*. It is here, however, proper

* *Arab. Hibræi*. This, in its literal sense, signifies an *enemy*, the term, however, extends to *all mankind* except *Mussulmans* and *Zimmerts*, whether they be actually at war with the *Mussulmans* or not. It appears to be synonymous with the Latin *Hostis*.

to observe that it is not absolutely necessary to restrict a peace to the term above recorded (namely, *ten years*,) because the end for which peace is made may be sometimes more effectually obtained by extending it to a *longer* term.

If the *Imám* make peace with the aliens for a single term, (namely, *ten years*,) and afterwards perceive that it is most advantageous for the *Mussulman* interest to break it, he may in that case lawfully renew the war, after giving them due notice; because, upon a change of the circumstances which rendered peace advisable, the breach of peace is war, and the observance of it a desertion of war*, both in *appearance*, and also in *effect*, and war is an ordinance of God, and the forsaking of it is not becoming [to *Mussulmans*.] It is to be observed that giving due notice to the enemy is in this case indispensably requisite, in such a manner that treachery may not be induced, since this is forbidden. It is also requisite that such a delay be made in renews the war with them as may allow intelligence of the peace being broken off to be universally received among them; and for this such a time suffices as may admit of the *king* or *chief* of the enemy communicating the same to the different parts of their dominion, since, by such a delay, the charge of *treachery* is avoided.

and it may also be broken, when necessary, giving the infidels due notice;

If the infidels act with perfidy in a peace†, it is in such case lawful for the *Imám* to attack them without any previous notice, since the breach of treaty in this instance originates with *them*, whence there is no occasion to commence the war on the part of the *Mussulmans* by giving them notice. It would be otherwise, how-

unless they act perfidiously, when they may be attacked without notice.

* (So in the original :) meaning, that, although, where it advances the *Mussulman* interests, peace is the same as war, as it answers the same purpose (namely their advantage,) yet this is not the case where advantage is no longer derived from it.

† That is to say, break the peace by any hostile act.

ever, if only a small *party* of them were to violate the treaty, by entering the *Mussulman* territory and there committing *robberies* upon the *Mussulmans*, since this does not amount to a breach of treaty. If, moreover, this party be *in force*, so as to be capable of opposition, and openly fight with the *Mussulmans*, this is a breach of treaty, with respect to *that party* only, but not with respect to the rest of their nation or tribe; because, as this party have violated the treaty without any permission from their prince, the rest are not answerable for their act; whereas, if they made their attack by permission of their prince, the breach of treaty would be regarded as by the *whole*, all being virtually implicated in it.

Peace may be granted in return for property.

If the *Imám* make peace with aliens in return for property, there is no scruple; because, since peace may be lawfully made *without* any such gratification, it is also lawful *in return* for a gratification. This, however, is only where the *Mussulmans* stand in *need* of the property thus to be acquired: for if they be not *in necessity*, making peace for property is not lawful, since peace is a desertion of war, both in appearance and in effect. — It is to be observed that if the *Imám* receive this property by sending a messenger, and making peace, without the *Mussulman* troops entering the enemy's territory, the object of disbursement of it is the same as that of *Jizyat*, or capitation-tax; that is, it is to be expended upon the *warriors*, and not upon the *poor*. If, however, the property be taken after the *Mussulmans* have invaded the enemy, in this case it is as *plunder*, one fifth going to the *Imám*, and the remainder to be divided among the troops; as the property has in fact been taken by *force* in this instance.

War must not be undertaken against apostates.

It is incumbent on the *Imám* to keep peace with apostates*, and not to make war upon them, in order that they may have time to

* Meaning *tribes* which apostatise and desert the *Mussulman* cause, as occasionally happened in the earlier times of *Mohammedanism*.

consider

consider their situation, since it is to be hoped that they may again return to the faith.—It is therefore lawful to delay fighting with them, in a hope that they may again embrace *Islamism*; but it is not lawful to take property from them. If, however, the *Imám* should take property from them, it is not incumbent upon him to return it, as such property is not in protection.

If infidels harass the *Mussulmans*, and offer them peace in return for property, the *Imám* must not accede thereto, as this would be a degradation of the *Mussulman* honour, and disgrace would be attached to all the parties concerned in it;—this, therefore, is not lawful, except where destruction is to be apprehended, in which case the purchasing a peace with property is lawful, because it is a duty to repel destruction in every possible mode.

Mussulmans must not purchase a peace, unless in cases of extremity.

THE sale of warlike stores to aliens is not permitted; neither is it allowed to send merchants among them for the purpose of selling their horses and armour; because the prophet has forbidden us to sell warlike stores into the hands of aliens, or to carry them to them; and also, because the aliens, by selling them warlike stores, are strengthened to fight the *Mussulmans*.—Selling them *horses* is likewise unlawful, for the same reason. Selling them *iron* is also prohibited, as it is the material from which arms are constructed.—And as the sale of these articles is disallowed *before* peace, so is it likewise *after* peace has been concluded, as peace is of uncertain duration.—It is to be remarked that analogy would require that the rule with respect to selling them *provisions* or *clothing* should be the same as with respect to selling them *arms*: but to sell them victuals and clothing is lawful, in conformity with what is recorded of the *prophet*, that he directed *Sinnána* to carry provisions to the people of *Mécca* for sale, although those people were then *aliens**.

Warlike stores must not be sold to aliens.

* That is, had not yet submitted, or embraced the faith.

SECTION.

Protection
granted by a
single person
is valid.

If a free person grant protection to an infidel, or to a body of infidels, or to the people of a fort or city, the protection is valid, whether the person granting it be a *man* or a *woman*; and no person of the *Mussulmans* is afterwards at liberty to molest them; because the prophet has said “*if the least among the MUSSULMANS grant protection to an infidel, and make a compact with him, it becometh the whole to observe such protection and compact, and not to break it;*” and the learned agree that the word *adna*, [the least,] in this saying, means a *single person*;—and also, because any single *Mussulman* is empowered to make war upon the infidels, wherefore they fear him, since he is competent to oppose them; by his granting protection, therefore, protection is established as from him, since he is one of whom protection may be asked; because the object of fear is the object to which to look for protection; and a single *Mussulman* is the object of fear, (according to what was before asserted, that “*the infidels fear him;*”) by his granting them protection, therefore, protection is established as from him, and it then extends to all others besides the person who grants it; in the same manner as in the case of seeing the new moon, at the commencement of *Ramzan**;—for, if a person testify to seeing the new-moon of *Ramzan*, saying “*I see it,*” the fast of *Ramzan* becomes incumbent upon him, and the obligation then extends to all others;—and so in the present case likewise, the protection becomes binding upon all others besides the person who grants it,—and the obligation of it extends from him to all the rest,—and they are not at liberty to surridge it.—Moreover, the cause of the validity of protection is the act of protecting; and as that is not of a *double* nature, so the

* The ninth month of the *Mohammedan* year, during which a strict fast is enjoined, commencing from the first appearance of the new moon.

protection is not divisible, and is therefore complete;—that is, the protection granted by one *Mussulman* is considered as proceeding from the *whole*, in the same manner as the exercise of guardianship in marriage:—for if one of several guardians of an infant, who are all upon an equality, in point of guardianship, contract the infant in marriage, the marriage is valid and binding upon all the other guardians, and no one of them is at liberty to annul it: thus, in the present case, if any one *Mussulman* grant protection to an infidel, the same is established and binding upon all others, and no *Mussulman* is at liberty to annul it, since the protection is valid,—except where it has an evil tendency, in which case it must be annulled, and intelligence of the same must be communicated to the infidels, in the same manner as if the *Imám* himself were to grant a protection, and afterwards find it advisable to annul it, in which case he is at liberty to annul it, giving the infidels notice of the annulment, as has been already stated.—The *Imám* must also reprehend any person who singly gives a protection, where the protection is of evil tendency, as he has in this instance presumed to set his own judgment above that of the *Imám*, and has confided in his own prudence. It is otherwise where the protection is *advisable*, as the person who grants it has here an excuse, since if he were to delay giving the protection, the good to be derived from it might be defeated.

If a *Zimmer* grant protection to an alien infidel, his protection is not valid, because the acts of a *Zimmer* are liable to suspicion, with respect to granting protection, on account of his infidelity; besides, a *Zimmer* has no authority with respect to *Mussulmans*.

If a *Mussulman* be residing among the infidels, either as a *captive* or a *merchant*, and grant a protection to aliens, his protection is invalid, because he is in the power of the aliens, wherefore the aliens are not in fear of him, and protection is restricted to the object of fear; and also, because, as persons in those situations are liable to be constrained to grant a protection, they may not be directed by what

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The protec-
tion granted
by a *Zimmer*.

or by a *Mus-
sulman* resid-
ing among
infidels.

is advisable. If, moreover, the protection granted by the captive or the merchant were valid, whenever the infidels found themselves pressed in war, and unable to carry it on, they might influence the captive or the merchant to grant them a protection, and through means of that protection they might find relief, when the door of victory over them would be closed.

or by a pro-
felyte who
has not yet
retired into
the *Mussulman*
territory, is
not valid.

If a person who has embraced the *Mussulman* faith in the country of the aliens, but who has not yet retired into the *Mussulman* territories, grant protection to infidels, this protection is not valid, for the same reasons as are assigned in the preceding case.

The protec-
tion granted
by a *slave* is
not valid,
unless he be
licenced to
engage in
war.

If a [*Mussulman*] slave grant protection, it is not valid (according to *Haneefa*) except where his master has given him permission to engage in war. *Mohammed* says that the protection granted by a slave is valid, and such also is the opinion of *Shafei*.—*Aboo Yoesaf* also agrees with him, according to one tradition.—According to another tradition, his opinion is the same as that of *Haneefa*. The arguments of *Mohammed* are twofold:—FIRST, *Aboo Moosa Asbydree* relates that the prophet declared the protection granted by a slave to be a valid protection:—SECONDLY, a *slave* may also be a *believer*, and may consequently possess a power of resistance*: the protection granted by an *unlicenced* slave, therefore, is valid, in the same manner as the protection granted by a slave who has been permitted to engage in war;—and in the same manner, also, as a contract of fealty or subjection is valid; (for, if an alien were to execute a contract of fealty before a slave, and the slave agree thereto, the contract is valid †;—and so here likewise.)—The reason why a slave, *not* licenced to en-

* In opposition to the state of an *infidel*, who not being allowed to carry arms, is held incapable of resistance.

† That is, the alien is made a *Zimmer*, or subject of the *Mussulman* state.

gage in war, is held in the same light as one who is *licenced*, is that the cause of the validity of the protection granted by the *licenced* slave is his being a *believer*, and consequently capable of resistance; and this circumstance is constituted the cause, on the ground that *faith* is conditional to *piety*, and war [with infidels] is an act of piety.—This *power of resistance*, moreover, is made a condition, in order that the protection may be established as from its proper source, since the object of fear is the object to which to look for protection. Now as the slave in question possesses a power of resistance, he is *fearcd*, and protection may therefore proceed from him; and the advantage of protection (namely, the advancement of religion, and of the *Mussulman* interests) is also obtained; for the question supposes a case in which the interest of the *whole body* of *Mussulmans* is concerned. It being demonstrated, therefore, that the causes of the validity of a protection granted by a licenced slave are *belief*, and a consequent *power of resistance*, and these causes existing equally in the slave who is *not* licenced, it follows that his protection is equally valid:—but yet it is not lawful for him to *fight*, because this would be contrary to his master's interest*, —whereas the granting of protection being only a *speech*, the interest of the master can in no respect be endangered by it.—The arguments of *Haneefa* on this subject are twofold;—FIRST, a slave who is not *licenced* to fight is *inhibited from* fighting, whence his protection is not valid; because the infidels have no fear of him, and consequently he cannot be the source of protection, (since the *object of fear* is the object to which to look for protection, as was already observed;)—and such being the case, a protection granted by him is of no effect: contrary to a slave who is *licenced* to fight, since he is established the object of fear.—SECONDLY, fighting is not lawful to the inhibited slave, as this is an act which affects his master in such a mode as to create an apprehension of damage to him; and the slave's granting protection is also of the same nature, because granting protection is one branch of

* As it would endanger the life of the slave, who is his master's property.

military.

military authority, since the design of *fighting* is to remove the wickedness of the infidels, and this end is obtained by granting protection; the slave's granting protection, therefore, is one of the branches of war; and in this there is an apprehension of injury to his master;—for a slave sometimes makes a mistake in granting protection, (nay, it is the rather to be apprehended that he *should* make a mistake,) because, as his time is chiefly employed about his master, he cannot be experienced in *war*, and hence, if his protection were valid, plunder would be precluded; and this is an injury to all the *Mussulmans*, of whom his master is one. The protection, therefore, granted by an inhibited slave is an act of military authority, in which there is an apprehension of injury to the master, and consequently is not valid. It is otherwise where a slave licenced to fight grants a protection, because this is valid, although it admit an apprehension of injury in respect to the master, since the master appears consenting to his own injury. A licenced slave, moreover, is seldom guilty of a mistake, because he is accustomed to fighting. The case in question is also different from a contract of fealty; because such a contract is a substitute for conversion to the faith, and therefore stands in the place of a *call* to the faith; and also, because such a contract is as a balance to *capitation-tax*; and also, because consent to such a contract, when the infidels desire it, is ordained; and the fulfilment of a divine ordinance is peculiarly advantageous: hence there is an evident distinction between granting protection and assenting to a contract of fealty.

The protection granted by a boy is not valid.

If a boy of immature understanding grant a protection to an infidel, his protection, like that of a lunatic, is not valid.—If the boy be of mature understanding, but not licenced to engage in war, then concerning his protection there is a difference of opinion, the same as before mentioned respecting the unlicenced slave: if, however, this boy be licenced to engage in war, his protection is valid;—and this is approved.

CHAP. IV.

Of Plunder, and the Division thereof.

If the *Imâm* conquer a country by force of arms, he is at liberty to divide it among the *Mussulmans*, (in the same manner as the prophet divided *Khebir* among his followers:)—or, he may leave it in the hands of the original proprietors, exacting from them a capitation-tax, and imposing a tribute upon their lands, in the same manner as *Omar* did with respect to the people of *Irak*.—The *Imâm*, therefore, has either of these at his option, and may prefer that mode which is most adapted to his situation. Some, however, assert that the *former* of these is preferable, where the troops are necessitous,—and that the *latter* is preferable, where they are *not* necessitous, in order that the tax and tribute may be reserved as a fund to answer contingencies.—Such is the law with respect to *immoveable* property and *lands*:—but with respect to *moveable* property, it is unlawful to leave that with the infidels, as no mention is made of it in the sacred writings.—*Sbafî* maintains that leaving *immoveable* property with them is also unlawful, since this would be destructive to the right of the troops;—the relinquishment of it, therefore, is illegal without an adequate return; and tribute is not an adequate return, as it is, comparatively, of trifling value. It is otherwise with respect to the *persons* of the infidels, which the *Imâm* may lawfully release in consideration of a capitation-tax, because, as the *Imâm* may lawfully destroy the right of the troops in their persons, by putting them all to death, it follows that his destroying this right *for a return*, is lawful *a fortiori*, although the return be of a *trifling* nature.—This reasoning, however, is refuted by what is recorded of *Omar*, as above.—Moreover, leaving the conquered country in the hands of the inhabitants,

A conquered country may either be divided among the troops, or left in the possession of the inhabitants under tax and tribute

but moveable property cannot be left with them.

in the manner before mentioned, is advantageous to the *Mussulmans*, and adviseable in respect to them, because in this case the inhabitants are merely the cultivators of the soil on behalf of the *Mussulmans*, as performing all the labour, in the various modes of tillage, on their account, without their being subjected to any of the trouble or expence attending it.—With respect to what *Shafëi* alleges, that “tribute” is, comparatively, of trifling value,” we reply, that although tribute be a *trifle* on the instant, yet with regard to *property* it is considerable, on account of its being *permanent*.

further than
may be ne-
cessary to
enable them
to till their
lands.

If the *Imâm* relinquish to the inhabitants of the territory their lands and persons, it is incumbent on him to resign to them such a portion of their moveable property as may enable them to perform their business, and cultivate their lands, lest abomination be induced; since if he were not to leave them thus much property, it would be abominable.

Captives may
either be
slain, or *re-
sued*, or ad-
mitted to be-
come *Zimmies*;

THE *Imâm*, with respect to captives, has it in his choice to slay them, because the prophet put captives to death,—and also, because slaying them terminates wickedness:—or, if he chuse, he may make them slaves, because by enslaving them the evil of them is remedied, at the same time that the *Mussulmans* reap an advantage:—or, if he please, he may release them so as to make them freemen and *Zimmies*, according to what is recorded of *Omar*:—but it is not lawful so to release the idolaters of *Arabia*, or apostates, for reasons which shall be hereafter explained.

but they must
not be suf-
fered to re-
turn to their
own country;

It is not lawful for the *Imâm* to return the captives to their own country, as this would be strengthening the infidels against the *Mussulmans*.

and, if they
embrace the
faith, they

If captives become *Mussulmans*, let not the *Imâm* put them to death, because the evil of them is here remedied without slaying them:
but

but yet he may lawfully make them slaves, after their conversion, because the reason for making them slaves, (namely, their being secured within the *Mussulman* territory,) had existence previous to their embracing the faith. It is otherwise where infidels become *Mussulmans* before their capture, because then the reason for making them slaves did not exist previous to their conversion.

must not be
put to death.

IT is not lawful to release infidel captives in exchange for the release of *Mussulman* captives from the infidels.—According to the two disciples this is lawful, (and such, also, is the opinion of *Sbafēi*,) because this produces the emancipation of *Mussulmans*, which is preferable to slaying the infidels, or making them slaves.—The argument of *Haneefa* is that such an exchange is an assistance to the infidels; because those captives will again return to fight the *Mussulmans*, which is an evil; and the prevention of this evil is preferable to effecting the release of the *Mussulmans*, since, as they remain in the hands of the infidels, the injury only affects them, and does not extend to the other *Mussulmans*, whereas the injury attending the release of infidel captives extends to the whole body of *Mussulmans*.—An exchange for property (that is, releasing infidel prisoners in return for property) is also unlawful, as this is assisting the infidels, as was before observed; and the same is mentioned in the *Maxbab Mashboor*.—In the *Seyir Ka-beer* it is asserted that an exchange of prisoners for property may be made, where the *Mussulmans* are necessitous, because the prophet released the captives taken at *Biddar* for a ransom.

Exchange of
captives is
unlawful.

IF a captive become a *Mussulman* in the hands of the *Mussulmans*, it is not lawful to release and send him back to the infidels in return for their releasing a *Mussulman* who is a captive in their hands, because no advantage can result from the transaction. If, however, the converted captive consent to it, and there be no apprehension of his apostatizing, in this case the releasing of him in exchange for a *Mussulman* captive is a matter of discretion.

A converted
captive must
not be suf-
fered to re-
turn to his
own country.

Captives
must not be
released gra-
tuitously.

It is not lawful to confer a favour upon captives by releasing them gratuitously,—that is, without receiving any thing in return, or their becoming *Zimmets*, or being made slaves. *Shafai* says that shewing favour to captives, in this way is lawful, because the prophet shewed favour, in this way, to some of the captives taken at the battle of *Biddir*. The arguments of our doctors upon this point are two-fold: FIRST, God says in the *Koran* “SLAY IDOLATERS, “WHEREVER YE FIND THEM;”—SECONDLY, the right of enslaving them is established by their being conquered and captured, and hence it is not lawful to annul that right without receiving some advantage in return, in the same manner as holds with respect to all plunder; and with respect to what *Shafai* relates, that “the prophet shewed “favour, in this way, to some of the captives taken at the battle of “*Biddir*,” it is abrogating by the text of the *Koran* already quoted.

All cattle
and baggage
which cannot
be carried
away upon a
retreat must
be destroyed.

WHENEVER the *Imam* is desirous of returning from a hostile country into the *Musfulman* territory, if he should happen to have along with him baggage-cattle, such as oxen, camels, and so forth, and be not able to convey them into the *Musfulman* territory, it behoves him to slay and burn them; and he must not hamstring them, or turn them loose. *Shafai* says that he should leave them, because the prophet forbids us to slay animals for any other purpose than to eat them. Our doctors argue that the slaying of animals is lawful for any approved end; and what end can be more approved than breaking the strength of the infidels who are enemies? After slaying them they must be burnt, in order that the infidels may not derive any advantage from them, whence this answers the same purpose as destroying buildings or dwelling places*: contrary to burning *before* slaying, as the prophet has forbidden this; and contrary, also, to *ham-stringing*, as this is *disfiguring*, and that also is forbidden†. In the same manner,

* Probably meaning the buildings, &c. which the *Musfulman*, during their stay in the hostile country, may have constructed for their own accommodation.

† Chap. II. p. 148.

the *Imâm* must burn all such military stores as are capable of being burnt; and what cannot be destroyed in this way must be buried in some place which the infidels are ignorant of, in order that they may not make advantage of it.

THE *Imâm* must not divide the plunder in the country of the enemy, but must make the distribution of it in the *Mussulman* territory. *Shafëi* holds that it may be divided in the country of the enemy. This diversity of opinion is founded in a difference of tenets; for with our doctors the plunder is not the property of the troops, until it be brought into the *Mussulman* territory,—whereas, with *Shafëi* it is the property of the troops before it be brought into the *Mussulman* territory. From this difference in principle proceed a number of cases concerning which they differ, as related at large, by the author, in the *Kafiyat-al-Mountibee*. The argument of *Shafëi* is that the cause of right of property in plunder is *conquest*, where that conquest extends over property of allowable use, in the same manner as conquest is the cause of right of property with respect to game: now *conquest* means nothing more than *subjection* and *seizin*; and those are fully established with respect to the plunder in question. The arguments of our doctors upon this point are twofold: FIRST, the prophet has forbidden the *sale* of plunder in the country of the enemy; and as a *distribution* of property is in effect a *sale*, a prohibition in respect to the *sale* extends to the *distribution* likewise:—SECONDLY, in the case in question conquest is not established; because *conquest* signifies *subjection* and *seizin*, of such a nature that the seizer is capable of protecting the plunder, and also of carrying it from place to place; but in the case in question, the captors of the plunder may possibly be incapable of carrying it off into the *Mussulman* territory, as the infidels may be able to rescue it from the hands of the *Mussulmans*, since the property is still in their country.—Some allege that the radical ground of difference between *Hanefi* and *Shafëi* turns upon this question.—Do the *effects* of right of property (such as the lawfulness of *cotion*, *sale*, and so forth*,) take

The plunder must not be divided until it be brought within the *Mussulman* territory.

* With respect to the women or property taken.

place upon the division of the plunder in the enemy's country, where the *Imam* divides it at once without further trouble,—or do they not?—According to *Shafëi*, the effects aforesaid take place immediately upon the division; but in the opinion of our doctors they do not take place: and hence it follows that with *Shafëi* the plunder becomes the property of the troops before its being conveyed into the *Mussulman* territory, since the effects of a *right* of property cannot exist without the existence of the property itself;—but with our doctors the plunder does not become the property of the troops until it be brought into the *Mussulman* territory, since if it were their property, the effects of a right of property would take place upon the distribution of it in the enemy's country.

The warrior
and the aux-
iliary have an
equal right in
the plunder;

IN sharing the plunder, the warrior and the auxiliary (being present with the army,) have an equal claim; because the foundation of a right to plunder, according to our doctors, is the “going past the boundary of the *Mussulman* territory with an intention to fight;” whereas, in the opinion of *Shafëi*, *actual presence*, (that is, *being present at the place where war is carried on*,) is the cause of the right; and the warrior and his assistant are equal with respect to the cause of the right; and such being the case, they are equal in sharing the plunder. In the same manner, a person who has retired from the service by the admission of an excuse, (such as *sickness*, for instance,) is on an equal footing with him who actually *fights*, because he also is, in point of *right*, upon an equal footing with him who is actually engaged.

and also the
sick;

and so, like-
wise, any re-
inforcements
which join
the army be-
fore the plun-
der is carried
off.

If reinforcements join the army in the enemy's country, before the plunder is conveyed into the *Mussulman* territory, they are entitled to a full share of the booty. *Shafëi* says that if they join the army when the fighting is finished, they are not entitled to share with the warriors, because, in his opinion, the plunder becomes the property of

of the troops on the instant of its seizure, wherefore no person is afterwards entitled to share with them in it.—According to our doctors, on the contrary, the plunder is rendered the property of the *Mussulmans*, only by the circumstance of conveying it into the *Mussulman* territory, or the distribution of it in the enemy's country, or the sale of it there, (for by any of these the right of the troops is established;) here, therefore, no other person is entitled to share with the troops, whereas, any person who joined them previous to the division, &c. would have a claim to share with them.

THE *followers* of the army have no right in the plunder, unless they actually engage in fight with the infidels. According to one opinion of *Sbasfi*, they are entitled to a share in the plunder, in conformity with a saying of the prophet, "*The plunder belongs to those who are actually present;*"—and also, because the followers are likewise engaged in effect, as they increase the general strength of the army. The argument of our doctors is that those do not go into the enemy's country, or pass the *Mussulman* borders, with any design of fighting; and this is the apparent cause of a right in the plunder; and as the apparent cause does not exist, regard is had to the actual cause, namely, *engaging in fight*. If, therefore, they fight, their right is established in proportion to their stations;—that is, if they fight on *horseback*, they are entitled to a horseman's share, or if on *foot*, to a foot-soldier's share. With respect to the tradition cited by *Sbasfi*, it means that "the plunder belongs to those who are actually present with an intention of fighting."

Followers have no right in the plunder, unless they fight.

If the *Imam* be not possessed of carriages sufficient for the conveyance of the plunder into the *Mussulman* territory, he must distribute it among the troops, committing to each person his respective share, in the manner of a deposit, until they bring it into the *Mussulman* territory, when he must take it back from them, and again make a regular

In defect of carriages, the plunder must be distributed among the troops.

regular distribution of it. The compiler of the *Hedaya* remarks that this is what is mentioned by *Kadooree*, in his abridgment of his own work: and he does not make the *consent* of the troops a condition. The same is also mentioned in the *Seyir Kabeer*. In short, if there be among the plunder any carriage cattle, such as *camels*, *horses*, *asses*, or *mules*, the *Imám* must load the plunder upon them, because here the plunder and the carriage are both the property of the troops; and the rule is the same, if there happen to be any spare carriage attached to the public treasury, since the effects in the public treasury are the property of all the *Mussulmans*: but if there be any spare carriage attached to the troops, or to any part of them, yet the *Imám* must not forcibly seize them for this purpose, because this is *hire*, and compulsion in *hire* is not lawful; in the same manner, as when a person's animal perishes, upon a retreat, and his servant happens to have some spare carriage, in which case he cannot compel his servant to hire him such spare carriage.—This is according to the *Seyir Sagbeer*. According to the *Seyir Kabeer*, the *Imám* is at liberty to use compulsion, for the purpose of having the plunder carried, because this is preventing a *general* and *public* injury by the commission of a *private* injury.

The plunder must not be *fold* in the enemy's country.

It is not lawful to *fold* plunder whilst in the enemy's country, or before it be regularly distributed, because, until then, it is not *property*. According to *Shafe'i* the sale is lawful, because he holds that the plunder becomes property upon the instant of its capture.

Death in the enemy's country precludes the right to any share in the plunder.

If a warrior die in the enemy's country, he has no right in the plunder; but if he die after the plunder is brought into the *Mussulman* territory, in this case his share goes to his heirs. The reason of this is that actual right of property is essential to inheritance, and the warrior has not any right in the plunder before it be brought into the *Mussulman* territory, whereas *after* it is brought within he has a right

right in it. *Shaf'î*, on the contrary, maintains that if the warrior die *after the defeat* of the infidels, his share goes to his heirs, because he holds that the plunder becomes the property of the troops upon the infidels being defeated.

THERE is no objection to the troops feeding their cattle with plunder * whilst in the enemy's country, nor to themselves eating such plunder as is fit for *food*, such as *bread, oil*, and so forth. The compiler of the *Hedâya* observes that *Kâdooree*, in his abridgment, mentions this *absolutely*, and does not restrict it to the condition of *necessity*. There are, however, two reports relating to this subject: according to *one*, the liberty is restricted to the condition of *necessity*; and according to the other it is *un-restricted*. The reason upon which the *first* report proceeds is that the forage or victuals in question are a *partnership property*, and hence these acts are not permitted with respect to them except through necessity, agreeably to the rule which respects *animals*, or *cloth*: and the arguments upon which the *second* report proceeds is, *FIRST*, that the prophet said, at *Kbeeber*, "*Eat the FOOD found in the plunder, and feed your cattle with the FORAGE, and do not carry it along with you, or board it up:*"—*SECONDLY*, the point of law rests upon the *argument* of necessity, and not upon necessity itself: now the *argument* of necessity is certified, namely, the circumstance of the troops being in an enemy's country; because a soldier does not carry along with him into the enemy's country either subsistence for himself or forage for his cattle sufficient to serve during his residence there; and in time of war caravans cannot supply troops with subsistence. The food and forage, therefore, remain allowable to use upon the ground of the *argument* of necessity. It is otherwise in regard to *weapons* or *armour*, as it is not lawful for the troops to take these from the *plunder*, because they carry arms along with them, and hence the *argument* of necessity, in

The troops may use all eatable articles, &c.

* Such as *grain*, &c.

respect to arms, is not established: but yet regard is had to *actual* necessity in respect to the use of them; and hence, if any necessity occur for the use of such arms as may be among the plunder, it is lawful for the warriors to make use of them, afterwards returning them into the plunder: and *cattle* stand in the same predicament with *arms* in this respect.

Wood taken as plunder may be converted to use.

THERE is no objection to the warriors using *wood* [seized as *plunder*] in the enemy's country. It is also lawful for them to make use of *oil*, such as oil of olives, and also grease, for softening the hoofs of their cattle; because there is sometimes a necessity for these articles.

Victuals, &c. allowed to be used, cannot be sold.

IT is not lawful for the warriors to *sell* *viſuals*, *forage*, and so forth; because the legality of *ſale* depends upon the article sold being *property*; and these are not their property, (according to what has been already advanced,) the eating of the victuals or using the other articles being lawful only by *allowance*, in the same manner as when a person allows another the use of his victuals, in which case the the other may *eat* them, but cannot *ſell* them. It is to be observed that the prohibition of *ſale* now mentioned implies that it is not at all lawful for the troops to sell these articles in return for either *gold*, *ſilver*, or *effects*. If, however, they should sell them for gold, silver, or effects, it is incumbent on them to lodge the price along with the rest of the plunder, because this price is a thing held in partnership by the whole army. In the same manner, it is not lawful to dispose of those articles in return for provisions or cloathing, without necessity; but if a necessity for provision or cloathing occur, the articles in question may lawfully be disposed of in return for these necessities.

Plunder cannot be turned to use, but in

IT would be abominable in the troops, without necessity, to make use of *cloth* or other similar articles of plunder, before the regular distribution,

tribution, because these articles are, until then, held in partnership. If, however, the troops stand in need of cloth, cattle, or other articles, in this case the *Imâm* must distribute these among them, although in the enemy's country, because as a thing *prohibited by the law* is sometimes allowed in consideration of necessity, it follows that a thing which is merely abominable*, is allowed in a similar case, *a fortiori*. The foundation of this is that the division of the articles in question is abominable only from the apprehension of succours joining the army in the enemy's country; for these are equal partners with the rest of the troops; and if the plunder were divided before their arrival, and they then join the army, it would be impossible to obtain restitution, for the purpose of paying the auxiliaries their shares, (whence it is that the division of the plunder is delayed until it be brought into the *Mussulman* territory and this apprehension removed:)—but when the troops stand in need of the cloth, cattle, or other articles, in this case they may be distributed among them in the enemy's country, because the right of the auxiliaries is merely *probable*, whereas the necessity of the troops is *certain*, and therefore of prior consideration. Nothing is here said concerning the rule with respect to *arms*, and *armour*: there is, however, no manner of difference between these and *cloth* or other articles, for if any of the warriors stand in need of them, the use is allowed to him, and if all the troops stand in need of weapons and accoutrements, they must be distributed among them. It is otherwise, however, in the case of a want of male or female slaves, for of the captives no distribution can be made on any plea of *necessity*, because they come under the description of *indivisible plunder* †.

cases of necessity.

* *Abominable*, in the language of the *Mussulman* law, means a thing not absolutely illegal, but reprobated or disapproved.

† The only method of dividing plunder which consists of *captives* is by selling them at the end of the expedition, and throwing the price for which they are sold into the general stock of plunder. Plunder consisting of *cattle* is also divided in the same way, but as they are, comparatively, of trifling moment, this is no objection to the use of them.

An alien, becoming a convert, preserves his liberty and property, and his infant children;

If a hostile infidel become a *Mussulman* in the hostile country, his person is his own, (that is, he cannot be made a slave,) because a person who is first a *Mussulman* cannot then be subjected to bondage, as his *Islam* forbids this.—In the same manner, his infant children belong to himself, because they also are held as *Mussulmans*, in dependance of their father.—Such of his *property*, also, as is in his hands is his own; because the prophet has said “*whoever becomes a* “ *MUSSULMAN, and is possessed of property, in his own hands, such property belongs to him;*”—and also, because his hands have first laid hold of that property, in the manner of the hands of a conqueror.—In the same manner such of his property as is a deposit in the hands of a trustee, whether a *Mussulman* or a *Zimmee*, is also reserved to him, because the seizure of the trustee is the same as that of the proprietor.

but his lands are public property;

If the *Imám* subdue a country by force of arms, the lands which were the property of one who has embraced the faith become the property of the public treasury*.—*Shafei* maintains that his lands also continue to belong to him, because they are *in his hands*, and hence are subject to the same rule as moveable property. Our doctors, on the other hand, allege that his lands are in the hands of the *state*, or of the sovereign of that territory, (as they are a constituent part of the country,) wherefore they are not, *a certiori*, in *his hands*.—Some observe that this is according to the opinion of *Haneefa*, and a recent opinion of *Aboo Yoosaf*: for, according to the opinion of *Mohammed*, and a former opinion of *Aboo Yoosaf*, the lands of this person are in the same predicament with his other property.—This difference of opinion originates in a difference of doctrine respecting the tenure of land; for *Haneefa* and *Aboo Yoosaf* hold that seizure is not established, *a certiori*, in lands; whereas *Mohammed* holds that it is established.—The

* Arab. *fee*, meaning that proportion of the plunder which is the right of the state.—The translator avoids introducing it here, from its similarity to the feudal term *fee*, which bears quite a different sense; and has therefore rendered it, throughout, *public property*, or *the property of the state*.

wife also of this person is public property, as she is an alien, and is not a dependant of her husband with respect to *Islam*: and her foetus is also under the same predicament.—*Sbafëi* maintains that her foetus is not public property, since it is a *Mussulman* in dependance of the father, in the same manner as infant children.—Our doctors, on the other hand, allege that the foetus is a portion of the woman, and is therefore a slave in consequence of her becoming a slave, since she is a slave in all her parts: and with respect to what is advanced by *Sbafëi*, that “the foetus is a *Mussulman*, in dependance of the father, in the same manner as infant children,”—they observe that although the foetus be a *Mussulman*, yet a *Mussulman* may be a subject of bondage in dependance of another person: contrary to the case of infant children; as the said children are free, because, after being born, they are no longer a portion of the mother.—The adult children of this person are also public property *, because they are infidel aliens, and are not dependant of their father in *Islam*:—and so likewise his slave who fights against the *Mussulmans*, because the slave, upon throwing off his subjection to his master †, goes out of the possession of his master, and becomes a dependant on the people of that territory.—In the same manner, such of his property as is in the hands of an infidel alien, whether in the way of *usurpation* or *deposit*, is the property of the state, because the seizure of an infidel alien is not of an inviolable nature:—and such of his property as is in the hands of a *Mussulman* or a *Zimmet*, in the way of *usurpation*, is in the same predicament.—This last is the opinion of *Haneefa*.—The two disciples maintain a contrary opinion, for they argue that the property is a dependant of the person, and as the person of the proprietor is under protection in consequence of his conversion to the faith, it follows that his property is also under protection, as a dependant of his person.—The argument of *Haneefa*

and so also his
wife, and her
foetus;

and his adult
children, and
slaves;

and his pro-
perty in the
hands of in-
fidel aliens,—
or of *Mussul-
mans*, by
usurpation.

* That is to say, are made slaves, and as such united to that part of the plunder which is the property of the state.

† By uniting in fight against the believers, of whom his master is now one.

is that the property in question is of a neutral nature*, and therefore liable to be appropriated by right of conquest:—and as to what the two disciples urge, we reply that it is not admitted that the person of the proprietor is under protection “*in consequence of his conversion to the faith,*” for the molesting of him is originally unlawful, (as appears by his being required to embrace the faith, since if he were *originally* deserving of death, he would not be required so to do,) and is rendered allowable only by a *supervenient* circumstance, namely his wickedness, [that is, his infidelity;] but by his conversion to the faith his wickedness is removed: contrary to *property*, as that is originally created for the purpose of being *used*, and is therefore a proper subject of appropriation. Moreover, the property in question is not in his hands either *actually* or *virtually*: its not being *actually* so is evident; and it is not *virtually* so, because the seizure of the *usurper* does not stand as the seizure of the *proprietor*, and hence the protection of the property is not established.—Thus it is demonstrated that his *property* is distinct from his *person*.

The forage
or provisions
taken must
not be used
after the eva-
cuation of the
enemy's
country:

and such of it
as remains
must be re-
turned into
the plunder
stores:

UPON the *Mussulman* army evacuating the enemy's country, it becomes unlawful for the troops to feed their cattle with forage belonging to the plunder:—and, in the same manner, it is unlawful for them to eat of such victuals as make a part of the plunder;—because the troops subsisting themselves, or feeding their cattle, out of the plunder, is allowed only on the ground of *necessity*, which is then removed; and also, because the right of each individual [in the plunder] is then confirmed, whence it is that the share of one who afterwards dies is hereditary, whereas, before the evacuation of the enemy's country, no person's share is hereditary.—If, also, after arriving in the *Mussulman* territory, there should chance to remain with any of the troops a part of the plundered food or forage, it must be returned into the stores of spoil, provided the general distribution of that should not

* Arab. *Mobab*: that is, not under any effectual protection.

yet have taken place.—*Shafëi* in one place agrees with our doctors.—In another place he asserts that those articles are not to be returned into the plunder stores; upon the same principle that a warrior, if he *steal* the property of an alien, is not required to deliver it into the plunder stores, because this is property of a neutral nature, upon which he has laid his hands first.—Our doctors, on the other hand, allege that the appropriation of the food or forage to the person in whose hands they remain was only *from necessity*; but upon arriving in the *Mussulman* territory this necessity is removed: contrary to the case of a warrior stealing the property of an alien, because, as he obtains an exclusive right in that property *before* his arrival in the *Mussulman* territory, it follows that he has the same exclusive right in it *after* his arrival there.—If, moreover, the forage or provision in question remain with any one *after* the general division of the plunder, in this case, provided the possessor be rich, he must bestow it in alms; but if he be *poor*, he may convert it to his own use, because the food or forage then stand in the same predicament with a *Lookta*, or trove property, since the restoration of it to the troops is become impossible.—If, also, any person should *use* the victuals or forage after arriving in the *Mussulman* territory, and before the plunder is distributed, it is incumbent upon him to pay the value thereof into the plunder; or, where the plunder has been distributed, he must, if *wealthy*, bestow the value in alms; but if *poor*, nothing is due from him, since the value of a thing is a substitute for the thing itself, and is therefore subject to the same rule.

or, if *used*,
the value
must be ac-
counted for.

SECTION.

Of the Manner of the DIVISION of PLUNDER.

One fifth goes to the state, and four fifths to the troops.

IN making a division of the plunder, the *Imâm* must set apart *one fifth* of the whole, and distribute the remaining *four fifths* among the troops, as it was thus the prophet divided it.

The share of a horseman is twice that of a foot soldier.

THE share of a horseman is double the share of a foot soldier, according to *Haneefa*.—The two disciples say that the share of a horseman is *thrice* that of a foot soldier, (and such also is the opinion of *Shaf'î*;) because it is recorded by *Abdoola Ibn Omar* that the prophet gave to the horseman *three* shares, and to the foot soldier *one* share, for this reason, that the right to plunder is in proportion to the *duty* and the *fatigue*,—and the horseman performs three several duties;—first, *Kirr*, or attack,—secondly, *Firr*, or retreat, (made by way of stratagem, or with a view to return to the charge with increased violence,)—and thirdly, *Isbût*, or standing firm in one place,—whereas the *foot soldier* performs only *one* duty, namely *Isbût* or standing in his post. The argument of *Haneefa* is that *Abdoola Ibn Abbas* relates that the prophet gave to the horseman *two* shares, and to the foot soldier *one* share; now this is irreconcilable with what is related by *Abdoola Ibn Omar*, whence a contradiction appears between two acts of the prophet; and such being the case, the saying of the prophet is adhered to, “ *to the horseman belongs two shares, and to the foot soldier one share.*”—*Ibn Omar* relates, moreover, that the prophet gave three shares to the horseman, and one to the foot soldier; and also, in another place, that he gave to the horseman *two* shares, and to the foot soldier *one* share; and as these two accounts are contradictory, a preference

preference is given to the relation of another person, namely, *Ibn Abbas*.—Besides, *attacking* and *retreating* are of the same nature, whence it appears that the horseman performs no more than *two* duties, and the foot soldier *one* duty; wherefore the share of the horseman is only *twice* as much as that of the foot soldier:—moreover, a regard to the heavier duty of the horseman is impracticable, as it is a matter which cannot readily be ascertained: hence the rule, with respect to the shares, must turn upon the apparent ground of claim to plunder; and on the part of the horseman *two* grounds of claim appear, namely, his *person*, and his *horse*, whereas, on that of the foot soldier *one* ground only appears, namely, his *person*;—the horseman, therefore, is entitled to twice the share of the foot soldier.—It is proper to observe, however, that nothing more is to be allowed to a horseman than the share on account of *one* horse, although he have along with him two horses, or more. *Abou Yoozaf* says that if he have *two* horses, or more, the shares on account of *two* horses are to be allotted him, because it is related, that the prophet once allowed a horseman shares for two horses,—and also, because one horse is liable to be sick or turn lame, whence there is a necessity for another horse.—The arguments of *Haneefa* and *Mohammed* are twofold.—FIRST, *Birrayeen Awoos* carried with him to the wars two horses, and the prophet allowed him only a single horseman's share:—SECONDLY, one man cannot fight upon two horses at one time, wherefore two horses cannot be considered as affording two claims, whence it is that where a person has *three* horses, yet he is not entitled to a share for three.—With respect to what is related by *Abou Yoozaf*, it is to be thus explained, that the prophet bestowed the share for two horses upon the horseman in the way of a *gratuity*,—in the same manner as he once allowed *Salima Bin Akooa* two shares, when he served as a foot soldier.—It is also proper to remark that a *Birzoon* *, an *Arab* †, an *Hoojeen* ‡, and a *Mokarrif* §, are all equally capable of giving a claim to plunder: be-

A horseman is not entitled to any thing additional from having more than one horse.

Horses of all descriptions equally entitle their owners to

* A heavy draft horse. † A first blood. ‡ A packhorse. § An half blood.

share as *horsemen*.

cause the expression in the *Koran*, *IRHÂB*, (that is, *striking terror*,) has a reference to the preceding word *KHEEL*, [a *troop*, or *squadron*,] and the word *Kheel* comprehends all those kinds without distinction;—and also, because although an *Arab* be apparently of the stronger make, yet a *Persian* horse is the more docile and managable; regard is, therefore, had to the advantages of each respectively, and hence they are both upon a footing.—The *Birsoon* is a horse of the *Persian* breed, and the *Arab* is bred in *Arabia*; the *Hoojeen*, on the other hand, is a *Moojânis*, or *half-breed*, whose dam is an *Arab* and his sire a *Persian*; and the *Makarrif* is also an half-breed, whose sire is an *Arab*, and his dam a *Persian*.

The horse being destroyed does not invalidate the claim of his owner to a horseman's share.

If a person enter the enemy's country as a *horseman*, and his horse be afterwards destroyed, he is still entitled to a horseman's share of plunder; but if a person enter the enemy's country on *foot*; and then purchase a horse, he is entitled to a *foot* soldier's share only. This is the *Zâbir-Rawdyet*.—*Shafei* maintains the *reverse* of what is here advanced; and *Ibn al Mobârrik* records, from *Haneefa*, that, under the *second* circumstance, the person is entitled to a *horseman's* share.—In short, with our doctors regard is had to the station in which a person passes the *Mussulman* boundary, whereas with *Shafei* regard is had to the station the person holds at the end of the service. The argument of *Shafei* is that it is the act of *making war* which is the cause of a right in the plunder; and hence regard is paid to the station in which a person is at the *time of fighting*, the passing of the *Mussulman* boundary being only an *introduction* to the cause, in the same manner as going out of a house:—and if (as the *Haneefites* maintain) it were impossible to ascertain the actual *fighting*, it would follow that the mere *actual presence* would be a cause of right in the plunder, since actual presence is easily ascertainable.—The arguments of our doctors upon this head are twofold.—FIRST, *going forth* is the commencement of the war, because it impresses terror upon the infidels; and the *continuance* constitutes the *war* itself:—but regard is not paid to the

the *continuance*:—SECONDLY, it is difficult to obtain any certain information respecting the actual *fighting*;—and so also, concerning the actual *presence*, because that has regard to the time when the two adverse armies are drawn up in battle array against each other, at which time it is not easy to ascertain who actually engages in fight, or who does not,—or who is present, or who is not;—the act, therefore, of *passing the boundary* is made the substitute for *fighting*, or *presence*, because the act of passing the boundary extends, with regard to *appearance*, either to *war*, or to *presence*, where such act was performed with a design of fighting.—Regard, therefore, is paid to the station a person fills (whether that of a *horseman* or of a *foot soldier*) at the time of passing the *Musfulman* boundary.

If a person enter the enemy's country as a *horseman*, and afterwards fight *on foot*, on account of wanting room, he is entitled to a horseman's share, according to all our doctors.—If, also, he enter the enemy's country as a *horseman*, and afterwards sell his horse, or give him away, or hire or pledge him, he is entitled to a horseman's share, (according to what *Hogsn* reports from *Haneefa*.) regard being had to the station in which he went forth.—According to the *Zâbir Rawdyet* he is in this case entitled only to share as a *foot* soldier, because his disposing of his horse in any of the ways here mentioned denotes that he did not go forth with a design to fight as a horseman.—If a person sell his horse when the service is at an end, his right, which is a *horseman's* share, does not drop.—Some hold the rule to be the same, if he sell his horse during the service; but the more approved doctrine is that he is not in this case entitled to a horseman's share, because the sale here denotes that his design was traffic, but that he waited until the service began, with a view to enhance the price of his horse.

A horseman occasionally fighting on foot is yet entitled to share as a horseman;

and may sell his horse at the end of the service, without injury to his claim.

Slaves, women, children, or Zimmies have no share, but are to be paid something.

THERE is no share of the plunder allotted to *slaves, women, children, or Zimmies*: but yet it is incumbent on the *Imám* to bestow something upon them, to such amount as he may deem adviseable; because the prophet, although he did not fix any share for women or children, yet was accustomed to allow them a small part; and also, because the prophet once demanded aid from a certain party of *Jews* against another party of the same people, and yet did not allow them any thing in the manner of a *share* or *lot*; and also, because *Jibád* [war with infidels] is an act of piety, of which *Zimmies* are held incapable; and women and children are unable to perform this duty, whence it is not an injunction upon them; and in the same manner, a slave also is unable, as he cannot engage in war or battle without the consent of his owner: yet it is requisite that they be allowed something, in order that they may be encouraged to fight, and that the inferiority of their station be rendered manifest. (A *Mokátib* is in the same predicament with an absolute slave in this particular, since he is still in a state of bondage, and it is possible that, as he may be unable to discharge his ransom, his master will not permit him to engage in fight.)—It is proper to remark, however, that this small allowance out of the plunder is not paid to a slave; except where he *actually fights*, as he goes into the enemy's country merely for the purpose of waiting upon his master, and is therefore in the same situation with a merchant who goes into the enemy's country for the purpose of *traffic*, and not with a view to *fighting*. In the same manner, this allowance is not paid to a woman unless she attend the sick and wounded and prepare their medicines; because she is unable *actually to fight*; but her attendance and assistance are admitted as substitutes for fighting: contrary to the case of a *slave*, as he is able *actually to engage in fight*. In the same manner, this allowance is not paid to a *Zimmie*, unless where he fights, or where he acts as a guide; which is also of advantage to the *Mussulmans*; and in this last case it is lawful to pay him even *more* than the share of a *Mussulman*, if his acting as a guide be attended with any eminent advantage:—but when he only *fights*, what

Zimmies, acting as guides, may be paid an extraordinary gratuity.

what is paid him must be short of a *Mussulman's* share, because fighting is *Jihād*, and a *Zimmee* cannot be put upon a footing with a *Mussulman* in the rules of *Jihād*: contrary to the case of acting as a guide, since that is not *Jihād*, and he may therefore receive a consideration for it, to any amount, in the same manner as for any other service.

THE *Khams*, or fifth, of the plunder * must be divided into three equal portions, one portion for *orphans*, one for the *poor*, and one for *travellers* †. Rules respecting the *Khams*.

If one or two particular persons enter a hostile country, with a view to pillage, without authority from the *Imám*, and make a capture of property, it is not subject to *Khams*; because there is no *Khams* in any thing but *plunder*, and the property in question is not *plunder*, as this term is applied solely to such property as is taken from the infidels by *open force*, and not by *theft* or *pillage*; and the property in question is not taken by *open force*.

If one or two particular persons enter a hostile country, by authority of the *Imám*, and make capture of property, there are two opinions related concerning it; but the most generally received opinion is that a fifth is to be deducted from it, because the *Imám*, in giving them this authority, undertakes to support them with succours, if necessary, and hence they in this case stand as persons engaged in war in a *public* sense.

If a party enter a hostile country, in force, and make a capture of property, what they take is subject to *Khams*, although they act

* Set apart by the *Imám*, as before-mentioned.

† A long train of reasoning, chiefly consisting of verbal criticisms, and the legality of bestowing a part of the fifth upon the *Háshimí* tribe, is here omitted, as being quite useless, and in some places not admitting of an intelligible translation.

without the authority of the *Imám*; because this property has been taken openly, by force of arms, and therefore falls under the description of *plunder*;—and also, because it is incumbent upon the *Imám* to assist them, since if he were not to do so, the *Mussulmans* might appear weak and unable to oppose their enemies:—contrary to the case of *one* or *two* particular persons, since to assist *them* is no way incumbent upon the *Imám*.

S E C T I O N.

Of TANFEEL, that is, a Gratuity bestowed upon particular Persons, over and above their Share of PLUNDER.

Gratuities
must be occa-
sionally be-
stowed:

It is laudable in the *Imám* to bestow gratuities in time of war, and by means thereof to encourage the troops to fight, or more properly to render them zealous in fighting,—by declaring (for instance) “Whoever kills an infidel shall have his garments,”—and so forth, (as will be hereafter more particularly mentioned;)—or, by promising to any particular body of troops, “I have allotted you one fourth of the plunder, after deducting the *ffish*,”—because it is laudable to encourage and stimulate to fighting, and making war upon the infidels, God having commanded his prophet in the *Koran*, saying “EXCITE THE BELIEVERS TO BATTLE!—and bestowing a gratuity in the manner specified is one way of exciting them.—(It is proper to observe that gratuity is sometimes held forth in the manner above described, and sometimes in another manner, as if the *Imám* were to declare “Whoever finds any thing, the same shall be his!”)—It is not laudable in the *Imám* to bestow the *whole* of the plunder in gratuity, because that is destructive of the right of the troops:—if, however, he bestow the whole, in gratuity, upon any particular party or division of the army, it is lawful, because the management of the plunder

plunder is committed to the *Imám*, and he may sometimes deem it advisable thus to make gratuity of the whole.

It is not lawful for the *Imám* to bestow any gratuity after the plunder is secured within the *Mussulman* territory, because the right of others in it is then confirmed. If, however, he see fit, he may bestow gratuity out of the *Khams*, or reserved *fifth*, because in that the troops have no right.

but not after the plunder is brought into the *Mussulman* territory.

If the *Imám* should not bestow in gratuity the *Sillib* (or personal property) of one who is slain, upon the slayer, it becomes a part of the *general plunder*, in which the slayer and others have all an equal share. *Shafei* maintains that the personal effects of the person slain belong to the slayer, provided the latter be one of those who are entitled to share in the plunder, and that he killed the slain in open fight, because the prophet has said, “*Whoever slays an INFIDEL is entitled to his personal property.*”

Rules respecting the *personal* property of the slain.

OBJECTION.—It is possible that the prophet may have mentioned this merely in a *gratuitous* sense, and not as the award of the LAW.

REPLY.—It is evident, from the situation of the prophet, that he spoke this as an award of the LAW, since he was sent to enforce the awards of the LAW. A person, moreover, who kills another prepared to oppose him in open fight exposes himself in a superior degree, and hence the personal property of the slain goes to him, for the purpose of making a distinction between him and others.

—The arguments of our doctors upon this point are twofold.—FIRST, the personal property in question has been taken, virtually, by the force of the *whole* army*, and is therefore plunder; and such being the case, it is to be generally shared, in the same manner as other spoil, in conformity with the words of the sacred text:—SECONDLY, the prophet

* Because, without being accompanied and supported by the army, the *slayer* never could have come at the *slain*.

once said to *Moorkbeeb-Bin-Abce-Silma*. “No more appertains to you of the property of the person you have slain, than your IMÂM may think proper to allow.”—With respect to the saying of the prophet cited by *Shafci*, it bears the construction both of the award of the LAW, and also of gratuity; and our doctors receive it in the latter sense, because of the saying above quoted, and also, because no regard is to be had to any superior degree of exposure or fatigue in war, as was already demonstrated in treating of the operations of cavalry. By *Sillib* is understood whatever may be found upon the person of the slai, such as *clothes*, *weapons*, and *armour*; and also the animal upon which he rode, together with the equipage, such as the *saddle* and so forth,—or whatever may be found upon him in his girdle or pockets, such as a purse of gold and so forth:—but any thing beyond these is not *Sillib*; nor is any thing so which is carried upon another animal by his servant.

Gratuity does not become a property until it be brought into the *Mussulman* territory.

It is a rule, with respect to gratuity, that the right of others in whatever may be so bestowed is terminated: but yet it does not become the property of the person to whom it is awarded until it be secured within the *Mussulman* territory, according to what has been already advanced; and consequently, if the *Imâm* were to declare, “*Whoever finds a female slave, she is his*,” and a *Mussulman* afterwards find a female slave, and ascertain his right in her, yet it is not lawful for him either to have carnal connexion with her, or to sell her, in the hostile country.—This is according to the two *Elders*. *Mohammed* asserts that he may lawfully do either, because he holds that gratuity establishes a right in a thing in the same manner as distribution of plunder in a hostile country, or purchase from the hands of an alien:—and some allege that *Mohammed* also holds that satisfaction is due from any person who should destroy this species of plunder,—whereas, with the two *Elders*, it is not due.

CHAP. V.

Of the Conquests of *Infidels*.

IF infidels of *Turkistan* conquer infidels of *Rome**, and make captives of them or seize their property, they are the rightful proprietors †, because here is established a subjugation over neutral ‡ property, which is a cause of propriety, as shall be hereafter shewn: and if *Mussulmans* should afterwards conquer those infidels of *Turkistan*, whatever property of the infidels of *Rome* they may find with these infidels of *Turkistan* is lawful to them, in the same manner as their other original property. In the same manner, if *infidels* obtain possession, by conquest, of the effects of *Mussulmans*, and secure the same (that is, carry them into their own country,) they are the rightful proprietors thereof. *Sbafei* maintains that they do not become the proprietors, because their conquest over the property of *Mussulmans* is unlawful both in the beginning and also in the end; and he holds that what is *unlawful* cannot create a right of property. Our doctors, however, allege that as the conquest of infidels over the property of *Mussulmans* is a conquest over *neutral* property, it creates a right, in the same manner as the conquest of *Mussulmans* would give them a right over the property of infidels. The ground of this opinion is

Infidels acquire a right in the property they gain by conquest, whether from *infidels*,

or from *Mussulmans*:

* This term is used by the people of *Asia* in a very extensive sense, comprehending the whole of the ancient *Roman* empire: it here applies, in particular, to the eastern provinces of the *Turkish* empire, which some *European* writers distinguish by the appellation of *Romelia*. *Turkistan* is a large region lying to the east and south-east of the *Caspian* sea.

† Meaning that the right of the original proprietors is dissolved and rendered void.

‡ *Arab. Mobab*. The meaning of this term is explained at large elsewhere.

that the property in question becomes *neutral* upon being secured within the alien territory; because property is originally *neutral* with respect to any person whatever, as God has said “THE WHOLE THAT “THE EARTH CONTAINS HATH BEEN CREATED FOR YOU,” (that is, for *mankind*;) every thing, therefore, upon the face of the earth, is designed alike for the use of all, and is not appropriated to any person in particular; whoever pleases may enjoy it: but yet, certain of that property becomes appropriated to certain individuals by one or other of the causes of right of property, such as *purchase*, *inheritance*, and so forth, in order that the individual may be enabled to make use of it; for if property were not thus appropriated, others would be continually interfering in the enjoyment of it: for this reason, therefore, and of necessity, certain property is assigned to certain individuals, who are respectively the proprietors. Now, when the infidels carry the property of the *Mussulmans* into their own territory, the proprietor is disabled from enjoying it any longer; and such being the case, the cause aforesaid, which was the occasion of the property being appropriated to the *Mussulman*, ceases; and the cause ceasing, the property becomes neutral, in the same manner as it was originally neutral: it being demonstrated, therefore, that the property, upon being carried by them into their own territory, becomes *neutral*, it follows that the conquest of the infidels over it is then a conquest made by them over *neutral* property, which is a cause of propriety; and hence they become the proprietors. It is to be remarked, however, that their conquest over the property is not established until after its being *secured* within their territory; because *securing* signifies being endowed with power over the article secured, (namely, the property) with regard both to *circumstance* and to *substance*; now, so long as the infidels do not carry the property into their own territory, their power over it is not substantiated, since whilst it continues in the *Mussulman* territory it is evident that the *Mussulmans* may rally and recover it out of the hands of the infidels. With respect to what is alleged by *Shafei*, that “their conquest over “the property of *Mussulmans* is *unlawful*, and a thing which is un-
“lawful

“lawful cannot be a cause of a right of property,”—we reply, that the conquest is unlawful, for another reason*; because the property in question is in its *original* nature *neutral*, (as has been already explained,) and conquest over neutral property is not unlawful; the conquest, also, in the present instance, is unlawful only from a *super-venient* cause, namely the proprietary of the owner: it therefore appears that it is unlawful for *another reason*; and a thing which is unlawful for *another reason* may yet cause a right, as in the instance of *sale* during the time of calling to public prayers. It is to be observed, however, that if the *Mussulmans* afterwards subdue the infidel territory, and the original proprietors of the property in question find it before the chief has made the distribution among the troops, such property is restored to the proprietors without any return: and if they find it *after* the distribution, they are entitled to take it upon payment of the value; because the prophet, in a similar case, said to the owner of a property, “*If you find your property BEFORE the distribution, it is yours without any return; and if, AFTER the distribution, it is your’s for the value*;—and also, because the right of the former owner has been destroyed without his consent, and hence he has a right, out of tenderness to his situation, to reclaim it: but if he were allowed to take it, after distribution, without giving an equivalent, an injury would follow to the person in whose share it may happen to be included; and hence it is said that he is at liberty to take it from that person *in return for the value*, in order that tenderness may be observed towards both. Previous to the distribution, on the other hand, the partnership in the property is *general*,—(that is, it appertains equally to all the warriors,)—and hence if the proprietor they take it, without any return, the injury to each individual is trifling, for which reason the owner is then allowed to take it without paying an equivalent.—If, also, a merchant go into the infidel territory,

but the *Mussulman* proprietors have a claim to restitution, if their property be retaken before the infidels have made a distribution of their spoil; and also, *after* the distribution, upon payment of an equivalent.

The same rule holds

* *Unlawful for another reason*; that is, not unlawful in its own nature, but rendered so by some extraneous circumstance.

with respect
to property
recovered in
the way of
traffic.

and there purchase property which had been plundered from the *Mussulmans*, and bring it into the *Mussulman* territory, in this case the former proprietor has it in his choice either to take the property from the merchant, paying to him the price for which he had purchased it, or to leave it; but he is not at liberty to take the property from the merchant *without* a return, as this would be injurious to him, since he obtained possession of it by paying the value. The rule here laid down is therefore an act of tenderness to both. If, moreover, the merchant had purchased the property by paying other property for it, the former proprietor is at liberty to take it upon paying the value of such property:—and if the infidels have made a *gift* of the property to the merchant, the former proprietor is at liberty to take it *upon paying the value*, because, as the merchant had become possessed of it by an exclusive right, such right cannot be destroyed but in return for the value.—What is here advanced proceeds upon a supposition of the property in question being a thing of a nature not compensable by its like. Where, on the other hand, it is compensable by its like, if it be brought into the *Mussulman* territory as *plunder*, the former proprietor is at liberty to reclaim it at any time before the distribution; but he is not at liberty to reclaim it in return for its like *after* the distribution, since in taking it in return for its like there is no advantage. In the same manner, also, if the infidels should have presented it as a *gift* to the merchant, the former proprietor is not at liberty to reclaim it in return for its like, since in this there is no advantage; and so also, there is no advantage, where the merchant had purchased it in return for its like with respect to *quantity* or *quality*. If, however, the merchant have purchased it for *less* than its quantity, or in return for something of a *different* kind, or for an article of the *same* kind, but in a state of *decay*, in either of these cases the former proprietor is at liberty to reclaim it in return for the like of whatever the merchant had purchased it with.

Cases of the
Slaves of
Mussulmans

If the *infidels* should make captive and carry off into their own country the slave of a *Mussulman*, and any person were afterwards to purchase

purchase and bring him back into the *Mussulman* territory, and any one were after that to put out the slave's eyes, and this person exact the fine,—the former proprietor is at liberty to reclaim the slave in return for the price for which this person had purchased him of the infidels: but he must not deduct any thing on account of the eyes, because the eye-sight is a natural quality, or *sense*, and the *senses* are not estimable at any price;—neither is he at liberty to take from this person the amount of the *fine* on account of the eyes, because the slave, at the time of putting out his eyes, was the lawful property of the person in question, whence *he* took the fine, as being the proprietor.

captured by
the infidel.

IF the infidels take and carry off the slave of a *Mussulman* into their own territories, and a person there, purchasing him for one thousand *dirms*, bring him back into the *Mussulman* territory, and the infidels again take him and carry him off into the infidel territory, and another person should then, in the same manner, purchase him for one thousand *dirms*, and bring him back into the *Mussulman* territory,—in this case the former proprietor cannot demand the slave of the second purchaser; because, when taken and carried off a *second* time, he was not *his* property: but the *first* purchaser may demand the slave of the *second* purchaser for the price at which he had bought him of the infidels, because the slave, when taken the *second* time, was *his* property; and then, if the former proprietor chuse, he may take the slave of the first purchaser on paying him two thousand *dirms*, because the slave has fallen to the latter at that sum; the original proprietor may therefore, if he please, take him for two thousand *dirms*.—It is a rule that the original proprietor is not empowered to take the slave of the *second* purchaser, where the *first* happens to be absent, in like manner as he is not empowered to take him of the second purchaser where the first purchaser is *present*.

Infidels do not, by capture, make a property of the *Modabbirs*, *Am-Walids*, or *Mokâtibs* of *Mussulmans*;

If the infidels attack and conquer a *Mussulman* territory, yet they do not, by conquest and conveyance into the infidel territory, become proprietors of the *Modabbirs* of *Mussulmans*, nor of their *Am-Walids* or *Mokâtibs*, or of freemen, whether *Mussulmans* or *Zimmecs*; whereas *Mussulmans*, on the contrary, by conquest in the infidel territory, become proprietors of all those; because conquest, which is a cause of right of property, produces a right of property in respect to a subject which is capable of it; and the subject capable of it is *neutral property*; now, a free *Mussulman*, and so also a free *Zimnee*, are not *neutral property*, being in their own nature protected and inviolable; and in the same manner, their *Modabbirs*, *Am-Walids*, and *Mokâtibs*, because in these also freedom exists in one shape: contrary to the persons of infidel aliens, whether they be *free*, *Am-Walids*, *Modabbirs*, or *Mokâtibs*, because the legislator has withdrawn protection from them, and has made them *neutral property*, in retribution for their sin of infidelity.

nor of an absconded slave.

If the slave of a *Mussulman* desert into the infidel territory, and the infidels make him captive, they do not become his proprietors, according to *Haneefa*.—The two disciples say that they become the proprietors, because the protection of the slave on behalf of his proprietor existed in virtue of the proprietors seizin, or actual possession of him; and in the case in question this possession is destroyed; whence it is that if the infidels were to take the deserter within the *Mussulman* territory, and carry him off to their own country, they would become his proprietors.—The argument of *Haneefa* is that the slave, upon going out of the *Mussulman* territory, becomes at his own disposal, in the same manner as a freeman; because as regard to his being in possession of his own person had ceased only in order that the possession of his master might be established, to enable him to make use of it; and, in the case in question, upon the possession of the master being destroyed, the slave's possession of his own person takes place, and he becomes in his own nature inviolable, in the same manner

manner as a freeman; wherefore he no longer remains a subject of acquisition: contrary to an absconded slave whilst in the *Mussulman* territory, since he still continues in the possession of his master, in virtue of the continuance of the *Mussulman* power within that territory. So long, therefore, as the possession of him by the master continues, his possession of his own person does not appear, wherefore he is not at his own disposal; and hence, if the infidels were to take and carry him off to the infidel territory, they would become his proprietors.—It is proper to observe in this place, that as the slave, in the present instance, is not the property of these infidels, the former proprietor is entitled to reclaim him without any return in all the cases before treated of,—that is, in case of the infidels having presented him in gift to any person, who afterwards brings him into the *Mussulman* territory,—or in case of any person *purchasing*, and so bringing him into the *Mussulman* territory,—or in case of the *Mussulmans* making him captive in the way of plunder, and bringing him into the *Mussulman* territory. In this last case, also, the former proprietor is at liberty to reclaim him without any return either *before* or *after* the distribution of the plunder; and if he should take him, *after* the distribution, from the person to whose share he has fallen, that person must be reimbursed out of the *public treasury*, a proportionable reimbursement from *each individual* being impossible, since the warriors are by that time all separated and gone different ways, and cannot again be brought together.—It is also to be observed, that the person who had obtained the slave by gift, purchase, or plunder, is not entitled to take any reward on account of the slave from the proprietor; because either of these appears to have acted solely on his own account, and under a conception that the slave is thereby rendered his property.

An absconded slave may, in every instance, be reclaimed by the proprietor.

If a camel, the property of a *Mussulman*, stray into the country of the infidels, and they lay hands upon it, they become the proprietors, in virtue of the establishment of their superiority over it; since a *brute* is incapable of being at its own disposal, in such a manner that

A stray animal becomes the property of the infidels by capture,

the

but may be reclaimed by the owner on being brought back.

the camel should become possessed of his own person upon quitting the *Mussulman* territory:—contrary to the case of a slave, according to what was before stated.—If, also, a person were to *purchase* the camel, and bring it back into the *Mussulman* territory, the original proprietor is entitled to take it upon paying that person the price for which he had purchased it.

Case of a slave absconding with property.

If the slave of a *Mussulman* abscond into the infidel territory, carrying with him a horse, or other effects, and the infidels seize the whole, and a person afterwards purchase the whole, and bring them back into the *Mussulman* territory, the former proprietor is at liberty to take his slave without any return, and to take the horse or effects upon paying the price for which they had been purchased.—This is the doctrine of *Haneefa*.—The two disciples assert that the former proprietor is at liberty to take, in return for the price, the slave, together with the accompanying property.—This difference of opinion arises from *Haneefa* holding that the infidels do not in this case become proprietors of the slave, in the same manner as where the slave absconds *alone* into the infidel territory, (that is, without carrying any thing along with him,) in which case the infidels do not become his proprietors, as has been already explained;—whereas the two disciples hold that they become proprietors in this case, in the same manner as where the slave absconds into the infidel territory without carrying any thing along with him; as was before stated.

A *Mussulman* slave, purchased by an infidel, becomes free upon entering an infidel territory.

If an infidel alien come under protection into the *Mussulman* territory, and there purchase a slave who is a *Mussulman*, and carry him into the infidel territory, the slave becomes free, according to *Haneefa*.—The two disciples say that he does not become free, because the right of the former owner has been destroyed by the *fale*, and the slave has become the property of the infidels, and the power of controul over the slave no longer remains to the former proprietor; the slave, therefore, continues in bondage with the infidel.—The argument

ment of *Hancefa* is that it is incumbent to release a *Mussulman* from the degradation of subjection to an *infidel*; wherefore separation of country, which is the *condition* of the destruction of proprietorship, is made the substitute of manumission, which is a *cause* of the destruction of proprietorship, for the purpose of releasing a *Mussulman*, in the same manner as the lapse of three menstruations is a substitute for separation, in a case where a husband or wife embraces the faith in a foreign country.

If the slave of an infidel alien become a *Mussulman*, and then pass into the *Mussulman* territory, or the *Mussulmans* conquer the infidel territory, such slave is free; and in the same manner, if the slave of an infidel alien embrace the faith, and desert to the *Mussulman* camp, he is free;—because of what is recorded, that certain slaves of the people of TAYEEF, having embraced the faith, came over to the prophet, and he announced their freedom, saying “*those are the freedmen of God!*”—and also, because the slave in question, where he takes refuge within the *Mussulman* territory, has placed his person in protection, in virtue of his coming there against his owner’s will;—or, where the *Mussulmans* conquer the infidel territory, has placed his person in protection, by joining the *Mussulmans*; since his possession of his own person is to be regarded preferably to the possession obtained over him by the *Mussulmans*, as the former took place previous to the latter, he being at his own disposal; and he has no occasion to take formal possession of his own person,—nay, he requires no more than that his possession over his own person should be more fully confirmed, since that possession is unconfirmed, on account of the appearance of the master’s right: contrary to others, as they are desirous of establishing a possession over him *ab initio*;—his possession of his own person, therefore, is to be regarded in preference..

The slave of an infidel, upon becoming a *Mussulman*, acquires a right to freedom.

C H A P. VI.

Of the Laws concerning *Moostámins* *.

A *Mussulman* residing under a protection in a hostile country must not molest the inhabitants.

IF a *Mussulman* go as a merchant into a hostile country†, it is not lawful for him to molest the inhabitants either in person or property, because he, in his acceptance of a protection, has undertaken to observe this forbearance towards them; any molestation of them afterwards would therefore be a breach of agreement; and a breach of agreement is prohibited.—It is therefore unlawful for him to molest them in person or property, unless where the sovereign of the country breaks the engagement with respect to him, by seizing his property, or throwing him into prison,—or where others do so with the sovereign's knowledge, he not preventing them,—in which case it is lawful for the merchant to molest them in person and property, as here the breach of contract is on *their* part. It is otherwise in the case of a *captive*, to whom it is lawful to molest them in person and property, although they should release him of their own accord, because a *captive* is not under protection.—It is proper, however, to observe that if the merchant break his agreement with the people of the country, and seize any of their property, and bring the same into the *Mussulman* territory, he becomes the proprietor, because his acquisition of power over neutral property is established;—but yet in his possession of it there is an abomination, because the property has been obtained by a breach of treaty, and this is the occasion of abomination with respect

* Persons residing in a foreign country, under a protection procured from the state or sovereign of that country.

† Arab. *Dar-al-hirb*: meaning, any foreign country under the government of infidels. The translator generally renders it *foreign country*.

to that property; and hence the merchant must be directed to bestow it in alms.

If a *Mussulman*, having procured a protection, go into a foreign country, and there purchase goods of an alien upon credit, or dispose of his goods to the alien upon credit, or usurp the property of an alien, or an alien usurp his property, and he afterwards return into the *Mussulman* territory under a protection, in none of these cases is the *Kázee* to pass any decree against one of those in favour of the other:—not in the *first* instance, because the validity of a decree of the *Kázee* rests upon his authority, and here the *Kázee* was possessed of no authority whatever at the time of the debt being contracted, with respect either to the debtor or the creditor, on account of separation of country;—neither is he possessed of any authority with respect to the protected alien at the time of the decree, as the alien has not undertaken to submit to the *Mussulman* laws with regard to acts done in time past, he undertaking only for the *future*, that is, from the period of his being admitted to protection:—nor in the *second* instance, because the property usurped has become the property of the usurper, as the usurper's acquisition of power over what he has usurped is an acquisition of power over neutral property, according to what has been before stated.—If, moreover, *both* of those persons were aliens, and one of them act by the other as above described, and they both afterwards come, under a protection, into the *Mussulman* territory, the rule is the same, for the reasons here mentioned:—but if both become *Mussulmans*, and then come into the *Mussulman* territory, in this case the *Kázee* may pass a decree with respect to the *debt*, because the debt of the one to the other is a lawful debt, as having been voluntarily engaged in; and the authority of the *Kázee* exists with respect to both, at the time of the decree, as they have then both submitted to the laws of *Islám*, by embracing the faith.—If, however, one of them should have *usurped* property belonging to the other, in this case the *Kázee* cannot

No decree can be passed in a *Mussulman* court respecting transactions between a *Mussulman* and an alien (or between two aliens) a foreign country,

pafs any decree whatever, according to what was before observed, that “ the usurper becomes proprietor of what he has usurped.”

Case of a
Mussulman
usurping the
property of
an *alien* who
afterward
becomes a
Mussulman.

If a *Mussulman*, having procured a protection, go into a foreign country, and there usurp the property of an alien, and the *Mussulman* and the alien (having become a *Mussulman*) come into the *Mussulman* territory, a notice is to be issued to the *Mussulman* usurper, in the *manner* of a decree, directing him to restore the usurped property to the converted alien; but the *Kázee* must not issue any positive *decree* upon the subject, for the reason before mentioned, that the usurper becomes *proprietor* of what he has usurped.—The notice in the *manner* of a decree is because the article usurped has become the property of the usurper by an invalid appropriation, on account of the breach of compact, which is unlawful.

Case of one
Mussulman
slaying an-
other *Mussul-*
man in a
foreign coun-
try.

If two *Mussulmans* go under protection into a foreign country, and one of them kill the other, either *wilfully* or *accidentally*, no retaliation is incurred; but the fine of blood is due from the slayer's property,—and an *expiation* is also incumbent upon him, where the act was accidental.—The reason why *expiation* is incurred is that the text of the *Koran*, upon which the obligation of it is founded, is general, and is not restricted to the *Mussulman* territory.—The reason why the fine of blood is due, is that the protection of the person, established by residence within the *Mussulman* territory, is not annulled by the supervenient circumstance, namely, the going under protection into a foreign country:—and the reason why *retaliation* is not incurred is that the infliction of retaliation is impracticable without the power*, and no power exists in the foreign country in the present instance, as power cannot be established but through the *Imám*, and the collective body of *Mussulmans*.—The reason why the fine of blood is due from

* Meaning the *executive power*, acting under the regular lawful authority.

the *property* of the slayer, in the case of *wilful* homicide, and not from his *tribe*, is that the fine for wilful murder is in no case due from the *tribe*;—and the reason why it is not due from the *tribe*, in the case of *accidental* homicide, is that, in the case in question, the tribe of the slayer have it not in their power to prevent the slayer from committing the homicide, or to guard against it; as they are in the *Mussulman* territory, and the slayer in a foreign country; and the fine for homicide falls upon the *tribe* of the slayer, only on account of their neglecting to guard against it, which is not the case in this instance.

If of two *Mussulmans*, who are captives in a foreign state, one kill the other,—or, if a *Mussulman* residing as a merchant in a foreign country kill another who is a captive there,—in either case nothing is due from the slayer, except expiation where the act was *accidental*.—This is according to *Haneefa*.—The two disciples maintain that, in the former case, the fine of blood is due, whether one of the captives have slain the other *wilfully* or *accidentally*; because the protection of their persons is not annulled by the supervenient circumstance, (namely *captivity*), in the same manner as the protection of a *Mussulman's* person is not annulled by the supervenient circumstance of his obtaining protection and going into a foreign country under its influence,—as was before demonstrated:—but *retaliation* is not incurred, because power does not exist in a foreign country, and the exaction of retaliation depends upon the existence of power, as has been already stated.—The fine of blood is also due from the *property* of the slayer, and not from his *tribe*, as before mentioned.—The argument of *Haneefa* is that a *Mussulman*, by becoming a captive to the infidels, is a dependant on them, as he is subjected to them, and in their power; (whence it is that he is *stationary* from their being *stationary*, and a *traveller* from their *travelling*;) and such being the case, the protection of his person is abrogated; he is therefore in the same predicament with a *Mussulman* who has never yet retired out of the infidel

Case of one
Mussulman
captive kill-
ing another.

territory*.—The reason for restricting the necessity of expiation, in all these cases, to *accidental* homicide, is that (according to our doctors) there is no expiation in a case of *wilful* homicide.

S E C T I O N.

An alien residing in the *Mussulman* territory above a year is subject to capitation-tax.

If an alien come, under a protection, into a *Mussulman* territory, the *Imām* must not suffer him freely to reside there for the complete term of a year, but must give him notice that “if he should remain “the full year he will impose *Jizyat* [capitation-tax] upon him.”—The reason of this is that an alien is not to be allowed to continue in the *Mussulman* territory for any considerable space of time, except in slavery, or in consideration of paying the capitation-tax; because, if an alien were to continue for a considerable term in the *Mussulman* territory in any other than one of those two states, he might become a *spy* on behalf of the alien infidels, to the detriment of the *Mussulmans*. He may be allowed, however, freely to remain for a *short* time, for if a *short* residence were prohibited, all intercourse would be prevented, and the door of *commerce* would of course be closed.—Our doctors have fixed the definition of a *long* space of time to the term of *one year*, [or upwards,] because a year is the term in which capitation-tax becomes due.—If, therefore, the protected alien return to his own country before the completion of the year, after the *Imām* shall have given him notice, as above, he is not to be molested, nor can the *Imām* demand any capitation-tax from him:—but if he continue in the *Mussulman* territory for a whole year, he becomes a *Zimnee*, or subject; because, when he remains a year in the *Mussulman* territory after the *Imām*’s

* Meaning an *alien* converted to the *Mussulman* faith.

notice to him, it is known that he undertakes to pay capitation-tax; and he becomes a subject of course.—It is lawful for the *Imâm*, however, to restrict the free continuance of an alien in the *Mussulman* territory to any term *short* of a year, (such as *one* or *two months*, for instance,) by giving him notice, that “ if he should remain beyond such a time, he will impose a capitation-tax upon him;” after which, if he continue beyond the time prescribed, he becomes a *Zimnee*:—and after becoming a *Zimnee*, if he be desirous of returning into his own country, he may be prevented; because a contract of fealty cannot be dissolved, since by the dissolution of it a stop is put to the receipt of capitation-tax; and another consequence also is induced, that such children as are born to him after the dissolution of the contract are aliens, and of course enemies to the *Mussulmans*, which would be injurious to the latter.

If an alien come, under a protection, into the *Mussulman* territory, and there make a purchase of tribute-land, and the tribute thereof be imposed upon him, he becomes a *Zimnee*, or subject; because tribute upon land is the substitute of a tax upon the person, (namely, *capitation-tax*;) and hence, when he undertakes the payment of *tribute*, it is known that he has become a resident in the *Mussulman* territory. He does not, however, become a *Zimnee* immediately on the purchase of the land, nor until such time as he undertakes the payment of tribute, since an alien may purchase land in the way of *traffic*:—but upon becoming subject to *tribute*, he also becomes liable to capitation-tax for the ensuing year, because by submitting to tribute he becomes a *Zimnee*, and hence the term of his capitation-tax is to be accounted from the time of his submitting to tribute.

An alien becomes a *Zimnee* upon purchasing and paying the impost on tribute-land.

and is then liable to capitation-tax.

If an alien woman come, under a protection, into the *Mussulman* territory, and there marry a *Zimnee* or infidel subject, she becomes a *Zimneea*, because she undertakes to reside in the *Mussulman* state, as being a dependant of her husband.

An alien woman becomes a subject by marrying a *Zimnee*.

If

but an alien does not become a *Zimmee* by marrying a female infidel subject.

If a protected alien marry a female infidel subject, yet he does not become a *Zimmee*, because it is in his power to divorce her, and so return into his own country; his marriage, therefore, does not necessarily infer his design of becoming a *resident*.

Case of an alien returning to his own country and leaving property in the *Mussulman* territory.

If a protected alien return into his own country, and leave property in deposit with a *Mussulman* or *Zimmee*, or leave a debt due from them to him,—upon going into his own country his blood becomes neutral*, because by that act he annuls his protection: and with respect to such of his property as remains in the *Mussulman* territory, the rule to which it is subject depends upon circumstances;—for if the alien, after returning to his own country, be made a captive,—or, if an army of *Mussulmans* conquer that country, and he be slain, the person indebted to him becomes discharged from the debt, and his property left in deposit becomes public property†, because the deposit is still virtually in his hands, since the seizure of his trustee is equivalent to his own seizure; the property in deposit, therefore, becomes public property in the same manner as his person if he were made captive. The reason why the debt due to him is remitted is that any thing due to a person is accounted to be in his possession, only as he is empowered to claim it; now, in the present instance, his claim has ceased; and as the debtor has possession of it prior to any other person, it becomes his exclusive right; and he is consequently exonerated from the debt.—If, however, the person in question be slain, *without* the *Mussulman* army subduing the country,—or, if he happen to die, in either case the debt or deposit goes to his heirs; because as his *person*, in this case, has not become subject to the laws of plunder, it follows that his *property* is not plunder, for this reason, that the effect of the protection still remains with respect to his *property*, which therefore goes to him, or to his heirs after his decease.

* That is, he may be slain without incurring any penalty.

† Arab *fee*.—Meaning that portion of the plunder which belongs to the *state*.

IT is to be observed that whenever property belonging to aliens is seized by *Mussulmans*, without war, it must be expended in defraying all charges of a public nature, in the same manner as *tribute*. The learned define this to be *land*, (for instance,) the proprietor of which has been ejected by the *Mussulmans*,—or *capitation-tax*:—and this property is not subject to the imposition of a fifth.—*Sbafëi* holds that a fifth is due both from the land in question, and also from capitation-tax.—The arguments of our doctors upon this point are twofold. FIRST, it is recorded of the prophet that he exacted capitation-tax, and lodged it in the public treasury, without deducting the fifth: SECONDLY, the property in question has been seized in consequence of fear for the *Mussulmans* operating upon the hearts of the infidels, without fighting. It is otherwise with *plunder*, as that is seized in consequence of two circumstances;—*one*, the prowess of the warriors in fight;—the *other*, the collective force of the *Mussulmans*; whence a fifth is due to the state on the *former* score, and the remainder to the warriors on the *latter*: and as the former reason does not exist with respect to the property in question, it follows that a fifth is not due from it.

Every thing gained from aliens without war is the property of the state.

IF an alien come, under a protection, into the *Mussulman* territory, and his wife and children remain in the alien country, and he have also property there, lying as a *deposit*, some with an alien, some with a *Zimmee*, and some with a *Mussulman*, and he become a *Mussulman* in the *Mussulman* territory, and the *Mussulmans* afterwards subdue his country, in this case the whole of his property, together with his wives and children, as aforesaid, are public property,—that is, *plunder*. His wives and adult children are public property, as being *aliens*, and *adults*, and therefore not dependants; and in the same manner, the embryo in his wife's womb, (according to what has been already stated, in treating of the distribution of plunder;) and so also, his infant children are public property, because an infant child is not held to be a *Mussulman*, in dependance of the *Islâm* of his father, unless he

Case of an alien, whose family and effects are in the alien country, becoming a *Mussulman* in the *Mussulman* territory.

be

be in the father's hands, and subject to his authority; and in the present case the infant children of the person in question are not subject to his authority, since he is in the *Mussulman* territory, and they in a foreign country. In the same manner, also, his *property* is not under protection, in virtue of the protection of his *person*, on account of difference of country, (for he is himself in the *Mussulman* territory, and his property in another country.) The whole of his wives and children, therefore, together with his property, are *plunder*.—If, however, the alien in question become a *Mussulman* in his own country, and then come into the *Mussulman* territory, and his wives and children continue in the alien country, and he have also property there, some deposited with a *Zimnee*, some with an alien, and some with a *Mussulman*, and the *Mussulmans* afterwards obtain the superiority in that country,—in this case his infant children are accounted *Mussulmans*, in dependance of their father, because here they were under his authority at the time of his embracing the faith, as he was then in his own country along with his children. Such of his property, also, as is in deposit with a *Mussulman* or a *Zimnee* appertains to him, as being virtually in his possession, since the seizure of his trustee amounts to the same as his own seizure.—Any thing beyond these, however, is public property:—his wives and adult children, according to what was before stated, that they are *aliens* and *adults*;—and such of his property, also, as is in deposit with an alien, because that is not in a state of protection, since the seizure of an alien is no protection: contrary to the seizure of a *Zimnee* or a *Mussulman*, as their seizure is a protection, whence it is that such property as he may have in their hands does not become the property of the public.

Case of an alien profelyte slain by a *Mussulman* in the alien territory.

If an alien embrace the faith in his own country, and a *Mussulman* slay him, either *wisfully* or *accidentally*, and his heirs also embrace the faith there, nothing is due from the slayer, except *expiation* where the act was accidental. According to *Sbafci*, he is liable to the fine of blood where the act was *accidental*, and to retaliation where it was *wisful*; because he has spilled the blood of one whose

blood was protected, since *Islām* is a protection, as men by *Islām* obtain a claim to reverence. The reason of this is that the *Isnut Mowsma* or *sin-creating* protection, (that is, the protection in consequence of which the slayer of the protected is an offender,) is the original principle, since through that principle determent is obtained;—for whoever is aware that the murder of the protected is a crime will refrain from committing such murder; thus it is proved that the *sin-creating* protection is the *original* protection; and this protection is established with respect to the *Mussulman* in question universally, since no person presumes to allege that the slayer of this man is *not* an offender. The *Isnut-makkoṭwim*, on the other hand, or *protection which bears a price*, (that is the protection in consequence of which the slayer of the protected becomes liable to the *Deyit*, or fine of blood,) is *not* the original principle, but is rather the perfection of the *sin-creating* protection, since by its means determent is more perfectly obtained, from its inducing both *sin* and *loss of property*. Now such being the case, it is evident that the *appreciable* protection is one description of the *sin-creating* protection, and it follows that the *appreciable* protection also is attached to *Islām* in the same manner as the *original* or *sin-creating* protection is attached to it. Fine and expiation are therefore due for killing an alien who has embraced the faith in a foreign country without retiring into the *Mussulman* territory.—The argument of our doctors is that God has said in the *Koran* “ IF THE SLAIN BE OF
“ A PEOPLE AT ENMITY WITH YOU, AND BE A TRUE BELIEVER,
“ IT IS INCUMBENT UPON HIS SLAYER TO EMANCIPATE A TRUE
“ BELIEVER*.” With respect to the arguments of *Shafci*, we reply that his assertion, that “ the *sin-creating* protection is attached to *Islām*,” is not admitted; for, the *sin-creating* protection is attached, *not* to *Islām*, but to *the person*; because man is created with an intent that he should

* That is, to procure the emancipation of a *Mussulman slave*: and no fine shall be paid, because in this case the relations of the murderer, being *infidels* and *aliens*, have no right to inherit after him.

bear the burthens imposed by the *LAW*, which men would be unable to do unless the molestation or slaying of them were prohibited. since if the slaying of a person were not illegal, he would be incapable of performing the duties required of him. The *person* therefore is the *original* subject of protection, and *property* follows as the dependant thereof, since property is, in its original state, *neutral*, and created for the use of mankind, and is protected only on account of the right of the proprietor, to the end that each may be enabled to enjoy that which is his own: but the *appreciable* protection applies to *property*, because its being *appreciable* evinces that the atonement for damage must be made in an article of the same nature with that which is the subject of protection; and this is possible with respect to *property*, but not with respect to the *person*, because the condition of it is that there be a similarity between the thing damaged and the thing in which the atonement is made, and this similarity may exist between *property* and *property*, but not between *property* and a man's *person*, since some property resembles other property, whereas property cannot resemble a man's *person*.—In *appreciable* protection, therefore, *property* is the *original*, and the *person* is a dependant thereof; and when the appreciable protection is established in property by means of the *security of country*, (which is the protection of *the state*,) it follows that the protection extends also to the *person* by means of the *security of country*: but this does not exist with respect to an alien who embraces the faith in a foreign country, without retiring into the *Mussulman* territory; wherefore the price of his blood (namely, the *Deyit*, or *fine of blood*) is not due.

OBJECTION.—A protected alien, who embraces the faith and afterwards apostatizes, enjoys *security of country* from residence in the *Mussulman* territory; wherefore it would follow that the fine of blood would be due for slaying such a one; because *appreciable* protection is occasioned by residence in the *Mussulman* territory, and that exists with respect to persons of this description: but we find that the fine of blood is *not* due for slaying a person of this description*.

* Because, as being an *apostate*, he has forfeited the protection of the *law*.

REPLY.

REPLY.—A protected alien, in the *Mussulman* territory, is virtually an inhabitant of a foreign country, since he intends to return thither: and so likewise an *apostate*, because he also is desirous of going into a foreign country, for fear of his life; such a person, therefore, does not enjoy *security of country* from residence in the *Mussulman* territory.

IF a person slay, inadvertently, a *Mussulman* who has no relations, or an alien who, having come under a protection into the *Mussulman* territory, has there embraced the faith, the fine of blood falls upon the tribe of the slayer; and the slayer owes expiation for the homicide, because, as he has slain a person of protected blood, the rule holds the same as with respect to all other protected persons. It is also to be observed that the *Imám* takes the fine, as the person slain has no heirs. If, on the other hand, a person *wilfully* slay such *Mussulman* or alien, in this case it is at the option of the *Imám* either to put the murderer to death, or to exact the fine of blood, because here the slain is of protected blood, and the killing is *wilful*: and the relations of the murdered person are found either in the whole body of *Mussulmans*, or in the Sultan, as the prophet has said “*The SULTAN is the relation*,” “*those who are without relations.*”—What is here advanced, that “it is at the option of the *Imám* to exact the fine of blood,” means that if the *Imám* choose, he may accept of the fine *in the manner of a composition*; because the LAW, in a case of *wilful murder*, awards only *retaliation*: thus the *Imám* is at liberty to accept of a fine, as that, in the case here treated of, is more advantageous than retaliation. The *Imám*, is therefore authorised to accept of a composition in property: but he is not at liberty to *pardon*; because, in the case in question, fine or retaliation is the right of the collective body of *Mussulmans*; and the *Imám*’s authority is established for the purpose of guarding the interests of the public; and the remission of their right without some return is a desertion of their interest.

Case of a person slaying a *Mussulman* who has no relations, or a foreigner protected, in the *Mussulman* territory.

CHAP. VII.

Of Tithe and Tribute.

Definition of
the terms
Ashar and
Kbiráj.

THE term *Ashar* [tithe,] in its primitive sense, signifies *ten*. *Kbiráj* [tribute] signifies the product of lands, and the hire of slaves; in the language of the LAW it denotes any established impost exacted as a tax upon land, or upon the persons of *Zimmes*, which last is termed *Jizyat*, or *capitation-tax*.

Extent and
situation of
the countries
subject to tithe
and tribute.

THE length of the territory of *Arabia Proper* is from the banks of the river *Uzeib* to the farthest part of *Yemn*, which is termed *Amboora*: and the breadth thereof from *Bereen*, and *Ribna*, and *Raml-Allij* to the borders of *Syria*: and the breadth of the territory of *Irák-Arabia* is from the *Uzeib* to the back of *Hilkwán*; and the length thereof from *Loalba* and *Aloos* to the extremity thereof, which is the fort of *Kotchuck* upon the sea side. Of this region, the lands of *Arabia Proper* are *Ashbooree*, or subject to *tithe*,—and those of *Arabia-Irák* are *Kbirájee*, or subject to *tribute*. The reasons for the former of these two arrangements are twofold. FIRST, the prophet and the commanders of the faithful * did not take tribute upon the lands of *Arabia*: SECONDLY, *tribute* is a substitute for that part of the plunder which goes to the state, and is therefore not imposed upon the lands of the people of *Arabia*, in the same manner as *capitation-tax* is not imposed upon their *persons*, for this reason, that one condition of imposing tribute upon land is that the people to whom the land be-

* *Arab. Khoofa-Rashidine*. The orthodox *Khalif*: it more particularly applies to the prophet's immediate successors.

longs, be established there as *infidels*, such as the people of *Irák* (for instance) who were permitted to continue in infidelity, whereas we are enjoined to make war upon the infidels of *Arabia* till they embrace the faith. The reason for the *second* arrangement is that *Omar*, when he subdued *Irák*, imposed tribute upon the lands in the presence of all the companions: *Amroo Ibn Aas*, moreover, when he conquered Egypt, imposed tribute upon the inhabitants; and the whole of the companions, in the same manner, agreed to impose tribute upon the people of *Syria*. It is to be observed, however, that the lands of the territory of *Irák* are the property of the inhabitants, who may lawfully *sell* or otherwise dispose of them; because the *Imám*, whenever he subdues a territory by force of arms, is entitled to re-establish the inhabitants in their possessions, and to impose tribute upon their *lands*, and capitation-tax upon their *persons*; and such being the case, the land continues the property of the inhabitants, as was before stated, in treating of *plunder*.

LANDS, the proprietors of which become *Mussulmans*, or which the *Imám* divides among the troops, are *Asboorce*, or subject to *tithe*; because there is a necessity that something should be imposed and deducted from the subsistence of *Mussulmans*, and a tenth is the proportion most suitable to them, as that admits the construction of an oblation and act of piety; and also, because this is the most equitable method, since in this way the amount of what is levied depends upon the actual product of the lands.—Lands, on the other hand, which the *Imám* subdues by force of arms, and then restores to the people of the conquered territory, are *Kberájee*, or subject to *tribute*; because there is a necessity that something be imposed and deducted from the subsistence of infidels; and tribute is the most suitable to their situation, as that bears the construction of a *punishment*, since it is a sort of hardship, the tax upon *tribute* land being due from the proprietor although he should not have cultivated it. It is to be remarked, however, that *Mecca* is excepted from this rule, as the prophet conquered that territory

Lands distributed among *Mussulmans* are subject to *tithe*:

and lands restored to the conquered are subject to *tribute*.

General rule
for fixing *tithe*
or *tribute*
upon land.

territory by force of arms, and then restored it to the inhabitants, without imposing tribute. It is written, in the *Jama Sagbeer* that all land subdued by force of arms, if watered by canals cut by the *Ajimees*, is subject to *tribute*, whether the *Imám* have divided it among the troops, or restored it to the original inhabitants:—and if there be *no* canals, but the land be watered by springs, which rise within it, it is *Ashbooree*, or subject to *tithe*, in either case; because *tithe* is peculiar to *productive* land,—that is, land capable of cultivation, and which yields increase; and the increase produced from it is occasioned by water. The standard, therefore, by which *tribute* is due is the land being watered by *tribute* water, namely, *rivers*;—and the standard by which *tithe* is due is the land being watered by *tithe*-water, namely, *springs*.

Waste land,
upon being
cultivated, is
subject to the
same impost
with the
neighbouring
grounds.

If a person cultivate *waste* lands, the imposition of *tithe* or *tribute* upon it (according to *Aboo Yoosaf*;) is determined by the neighbouring soils: in other words, if the neighbouring lands be subject to *tithe*, a *tithe* is to be imposed upon it, or *tribute* if they be subject to *tribute*; because the rule respecting any thing is determined by what is nearest to it; as in the case of a *house*, (for instance,) the rule with respect to which extends to its court-yard*, inasmuch that the owner of the house is entitled to make use of the court-yard, although it be not his immediate property.

OBJECTION.—According to the tenets of *Aboo Yoosaf*, it would follow that the lands of *Bassra* should be subject to *tribute*, whereas they are not so, but are subject to *tithe*.

REPLY.—Analogy would suggest this; but the companions imposed *tithe* upon it; wherefore the rule is in that instance set aside, because of the determination of the companions.

* *Arab. Finna*; meaning any open space immediately about and contiguous to the walls of a dwelling: but to render it of lawful use, it must be a *thoroughfare*, or belong to the dwelling itself.

MOHAMMED alleges that if a person cultivate waste lands by means of water drawn from wells dug in them, or by means of springs which rise in them, or with the waters of the *Euphrates* or the *Tigris*, or with the water of any large river or lake which has no exclusive proprietor, such lands are subject to *tithe*; and in the same manner, lands cultivated by means of *rain-water*:—but if he cultivate those lands with the water of canals cut by the kings of *Persia*, (such as the *Kissree*, and the *Yezdejird*,) they are subject to *tribute*; according to what has been already observed, that with him the *water* is regarded, as water is the *occasion* of increase;—and also, because the imposing of *tribute* upon a *Mussulman* without his previous consent is impracticable:—in the imposition, therefore, the *water* is to be regarded, because the tilling of the land with tribute water evinces that the proprietor submits to pay tribute.

THE *tribute* established and imposed by *Omar* upon the lands of *Irak* was adjusted as follows. Upon every *foreeb* * of land through which water runs, (that is to say, which is capable of cultivation) one *Sau* † and one *dirm* ‡; and upon every *foreeb* of *pasture-land*, five *dirms* §; and upon every *foreeb* of *gardens and orchards* ten *dirms* ||, provided they contain vines and date trees. (A *foreeb* of land signifies sixty *Zirra* **, of the *Persian Zirra*, which is seven *Kabzas* ††.) This rule for tribute upon arable and pasture lands, gardens, and orchards, is taken from *Omar*, who fixed it at the rates above-mentioned, none contradicting him; wherefore it is considered as

Rates of tribute.

* (According to the *Lexicon*,) *as much land as will produce about seven hundred and sixty-eight pounds weight of corn*: its extent is afterwards particularly described; from which it would appear that this calculation must be erroneous.

† About twenty-one pounds sterling; also a weight of about seven pounds.

‡ A small silver coin from two-pence to eight-pence sterling, but now of uncertain value.

§ From ten-pence to two shillings and sixpence sterling. || From one shilling and eight-pence to five shillings sterling. ** A square yard or *cubit*. †† *Kabza*, a *span*.

agreed

agreed to by all the companions. Upon all land of any other description, (such as pleasure-grounds, *saffron*-fields, and so forth,) is imposed a tribute according to ability; since, although *Omar* has not laid down any particular rule with respect to them, yet as he has made *ability* the standard of tribute upon *arable* land, &c. so, in the same manner, ability is to be regarded in lands of any *other* description.—The learned in the law allege that the utmost extent of tribute is *one half of the actual product*, nor is it allowable to exact more; but the taking of a *half* is no more than *strict justice*, and is not tyrannical, because, as it is lawful to take the *whole* of the *persons* and *property* of infidels, and to distribute them among the *Mussulmans*, it follows that taking half their incomes is lawful *a fortiori*.—By the term *gardens* [*Booslan*] is here understood grounds surrounded by a *fence*, and planted with fruit-trees, either *date*-trees or others. The compiler of the *Hedaya* remarks that in our country * tribute is levied upon all lands in *cash*: but this is immaterial, because the amount of the tribute is due, according to ability, either in *cash*, or in the actual product of the land. If the land be incapable of yielding the established tribute, the *Imán* must make an abatement; and it is lawful so to do, where the product falls short. According to *Mohammed* it is also lawful to exact *beyond* the established tribute, where the product happens to exceed, judging of a case of *increase* from a case of *deficiency*: but, according to *Abou Yoozaf*, it is not lawful to take more than the *established* tribute: and this is approved; because *Omar* never exacted any thing beyond what was established, upon being informed of any increase of produce: if, however, any thing be *voluntarily* given in addition to what is established, it may be accepted.

Tribute may be occasionally abated, but cannot be increased beyond the established rate.

Failure of the crop causes a remission of tribute.

If tillage be rendered impracticable in tribute lands, from floods or draughts,—or if, after sowing, the crop should fail from any other unavoidable cause, such as *locusts*, or *blights*, or *violent heats*, in

* Meaning the northern *Perfs*.

any of these cases tribute is not due from it;—because the landholder is unable at all to cultivate the soil, either in a case of *inundation*, or of a *scarcity* of water; and in a case of failure of the crop from other accidents (of *locusts*, *blights*, and so forth,) he is debarred from the advantage of tillage *for a part of the year*; in both cases, therefore, there is no increase (in the degree which constitutes *ability*) for the *whole year*; and it is conditional to the exaction of the tribute that this ability be found for the whole year, in the same manner as increase to the like degree *for the whole year* is conditional to the payment of *Zakât*.

If a landholder, where no obstruction to cultivation exists, keep *tribute* lands untilled, and thus reap nothing from them, tribute is nevertheless due upon them. The two *Elders* allege that if the landholder, being enabled to sow grain of the *first* quality, sow grain of a *second* quality, he is accountable for the *highest* degree of tribute: for instance, if his ground be capable of producing *saffron*, and he should therein sow *lentils*, in this case tribute as for *saffron* ground is due from him:—decrees, however, must not be passed to this effect*, lest tyrants might be encouraged to oppress the landholder.

Tribute is due although the land be untilled.

If any person subject to tribute become a *Mussulman*, tribute continues to be imposed upon him after his conversion to the faith, in the same manner as before; because tribute bears not only the sense of a *penal impost levied upon infidels*, but also, of a *provision for the expences of the state*; and in this sense the continuance of it upon a *Mussulman* is practicable.

A tributary continues subject to tribute after conversion to the faith.

It is lawful for a *Mussulman* to purchase tribute-lands of a *Zim-mee*; after which tribute is to be taken from him (the *Mussulman*), as it is said, in the *Nakl-Sabeeh*, that the companions purchased

Tribute-land purchased by a *Mussulman* continues subject to tribute.

* That is, *compulsion* must not be used to exact the tribute at this rate.

tribute-land, and paid the tribute upon it, which demonstrates that it is lawful for a *Mussulman* so to do, and not any abomination.

*Tithe is not
due from tri-
bute-land.*

TITHE is not due from the product of *tribute-lands*. *Sbafëi* affirms that *tithe* and *tribute* are both due from it, as they are two separate claims, due from two distinct subjects, and for two different reasons. The *subjects* are different, as *tribute* is a debt upon the proprietor's person, and *tithe* is due from the *actual product* of the lands: and the *reasons* for their being due are different, as the reason for *tribute* being due is, land being productive to the amount of *ability*, and the reason for *tithe* being due is, land being productive in *fact*. In the same manner, the objects of disbursement of each are also different, as *tribute* is expended upon the *troops*, and *tithe* upon the *poor*. The exaction of the *one*, therefore, does not forbid the exaction of the *other*.—The arguments of our doctors upon this point are three-fold.—FIRST, the prophet has said “TITHES and TRIBUTE are “not to be united in the land of *Mussulmans*.” SECONDLY, no instance has ever occurred of any magistrate attempting to unite *tithe* with *tribute*:—THIRDLY, *tribute* is due upon such lands as have been conquered by force of arms, and *tithe*, upon lands the proprietors of which have voluntarily embraced the faith,—and these two descriptions cannot both apply to one soil; but the *reason* for *tithe* and *tribute* is *one*, namely, a *productive soil*;—whence it is that *tithe* and *tribute* have a reference to *land*, and it is commonly said, “the TITHE of “land,” and “the TRIBUTE of land,” which shews that the reason for both is a *productive soil*,—in *tithe*, produce *actually*, and in *tribute*, produce to the degree of *ability*.—A similar difference of opinion obtains concerning the uniting of *Zakât* with *tithe* or *tribute*: that is, if a person purchase *tithe-land* or *tribute-land*, in the way of merchandise, our doctors hold that nothing but *tithe* or *tribute* is due, and that *Zakât* is not due; whereas *Sbafëi* maintains that together with *tithe* or *tribute* *Zakât* is also due, on account of the *traffic*;—and the same is the opinion of *Mohammed*.

*Zakât is not
due from tithe
or tribute-
land.*

IF *tribute-land* should yield *two* crops in *one* year, from a double cultivation, yet tribute is not to be levied a *second* time on account of the second crop, as *Omar* did not levy a *second* tribute, for a *second* crop. It is otherwise with *tithe*, as that is repeatedly levied on repeated produce, in *tithe-land*, because if *tithe* were not repeatedly levied on account of a repeated crop, the collection of it would be uncertain.

A second crop occasions a second payment of *tithe*, but not of *tribute*.

C H A P. VIII.

Of *Jizyat*, or *Capitation-Tax*.

JIZYAT, or *capitation-tax*, is of two kinds. The first species is that which is established voluntarily, and by composition,—the rate of which is such as may be agreed upon by both parties,—because the prophet entered into a composition with the tribe of *Binney Bijrán*, for twelve hundred pieces of cloth, and not more,—and also, because the fixing of tribute in this mode is a mutual act of both parties, and therefore it is not lawful to swerve from what has been so mutually agreed upon. The *second* species is that which the *Imám* himself imposes, where he conquers infidels, and then confirms them in their possessions, the common rate of which is fixed by his imposing upon every ayowedly *rich* person a tax of forty-eight *dirms per annum*, or four *dirms per month*;—and upon every person in *middling* circumstances, twenty-four *dirms per annum*, or two *dirms per month*;—and upon the labouring poor twelve *dirms per annum*, or one *dirm per month*. This is according to our doctors. *Shafei* maintains that he should exact from each sane and adult person, one *deenar*, or something to that amount;—and the poor and wealthy are on an equal footing in this point; because the prophet said to *Múaz*, “*Take from every male and female adult one DEENAR, or cloth to that value;*”—from which it

Capitation-tax is of two kinds, *voluntary*, (which is established by composition.)

and *imposed*.

Rates of imposed capitation-tax.

appears that there is no manner of difference between the *rich* and the *poor*, as the prophet spoke *generally*, without making any distinction: moreover, capitation-tax is due only in lieu of destruction *, (whence it is that it is not due from persons the destruction of whom on account of infidelity is illegal, namely *women* and *children*,) and in this sense it applies equally to the *rich* and the *poor*.—The arguments of our doctors upon this head are twofold.—FIRST, their doctrine is adopted from *Omar*, *Othman*, and *Ali*, with whom all the companions agreed upon this point: SECONDLY, capitation-tax serves as an *aid* to the troops, and therefore differs in its rate, according to the difference of men's circumstances, in the same manner as tribute upon land. The ground of this is that capitation-tax is due in lieu of assistance, with person and property †; but as property is different with respect to being *more* or *less*, so in the same manner that is different, which is a substitute for it.—With respect to the tradition adduced by *Sbafëi*, we are only to understand from it that the taking of *denars*, and so forth, from the tribe to whom he alluded was in the way of a *composition*, in which there is no difference between the *poor* and the *rich*, as is further proved by the term *female adults*, in the saying referred to, since capitation-tax is not incumbent upon *women*. It is to be observed that in the exaction of capitation-tax from the labouring poor, it is a condition that the person upon whom it is levied be in a state of health for the greater part of the year.

It is imposed
upon *Kitâbees*
and *Majoofees*.

CAPITATION-TAX is to be imposed upon *Kitâbees*, because this is mentioned in the *Koran*: and it is in the same manner to be imposed upon *Majoofees*, as the prophet imposed capitation-tax upon *Majoofees*.—Capitation-tax is also to be imposed upon the idolaters of *Ajim*, [*Persia*.] This is contrary to the opinion of *Sbafëi*, for he

* That is to say, is imposed as a return from the mercy and forbearance shewn by the *Mussulmans*, and as a substitute for that *destruction* which is due upon infidels.

† Namely, that assistance which every subject of the *Mussulman* government is by the law enjoined to afford towards carrying on the enjoined war with infidels.

argues that destruction is incurred by *all* infidels; but the legality of abstaining from it, in consideration of a capitation-tax, with respect to *Kitâbees*, is known from the word of the KORAN, and with respect to *Majoosees*, from the traditions; any others, therefore, than those, (namely, *idolaters*,) remain subject to the original penalty, which is *destruction*. The argument of our doctors is that as it is lawful to make slaves of the idolaters of *Ajim*, it follows that it is also lawful to impose capitation-tax upon them; because, in the same manner as, by reducing them to slavery, they are deprived of power over their own persons, so also, they are deprived of power over their own persons by the imposition of capitation-tax, since they must in this case work, and pay the *Mussulmans* the produce of their labour, and their subsistence is furnished from their labour.

If a *Mussulman* army subdue an infidel territory before any capitation-tax be established, the inhabitants, together with their wives and children, are all *plunder*, and the property of the state, as it is lawful to reduce to slavery all *infidels*, whether they be *Kitâbees*, *Majoosees*, or *idolaters*.

The inhabitants of a conquered country are the property of the state.

CAPITATION-TAX is not imposed upon the idolaters of *Arabia*, because their infidelity is particularly atrocious, since the prophet was sent among them, and manifested himself in the midst of them, and the KORAN was delivered down in their language; wherefore their depravity is most evident. In the same manner, capitation-tax is not imposed upon apostates, as their infidelity is also of an atrocious nature, because they have apostatised and become infidels after having been led into the way of the faith, and made acquainted with its excellence.—From neither of these, therefore, is any thing to be accepted, but they must embrace the faith, or be put to death. *Shafeï* holds that it is lawful to make slaves of the idolaters of *Arabia*:—the reply to him is contained in the arguments of our doctors as before recited.

No composition to be accepted from *Arabian* idolaters,

nor from *apostates*:

and upon being conquered they become public property.

If a *Mussulman* army conquer the idolaters of *Arabia*, or apostates*, their wives and children are plunder, that is, become the property of the state; because *Sideek* made slaves of the women and children of the *Binney-Haneeza* tribe, when they apostatised, and divided those slaves among the troops, and slew such of the men as did not return to the faith, for the reasons before assigned.

Capitation-tax not due from women, children,

CAPITATION-TAX is not due from *women* or *children*; because it is due either in return for a remission of destruction, or in lieu of assistance in the wars of the faith, and women and children are not liable to be slain,—nor do they engage in war, as they are incapable thereof. In the same manner, capitation-tax is not due from the *maimed*, the *blind*, the *paralytic*, or the *aged*, because these are incapable of engaging in war. It is recorded from *Abou I'oozaf* that capitation-tax is imposed upon the *aged*, where they are possessed of property, because an aged person, of sound understanding, is liable to be slain.

or paupers;

CAPITATION-TAX is not due from such poor as do no work †.—*Sbafei* maintains that capitation-tax is due from them, because of the tradition of *Muazz*, (before recited) which is *generally* expressed. The arguments of our doctors are twofold.—FIRST, *Orbman* refrained from imposing capitation-tax upon the poor of this description,—and this, in the presence of other companions:—SECONDLY, as tribute on land is not imposed upon ground incapable of bearing it, so in like manner capitation-tax is not imposed upon one who is unable to pay it: and with respect to the tradition of *Muazz*, although it be *generally* expressed, yet it relates to the *labouring* poor only.

* The term *apostate* applies not only to *individuals*, but also to *whole tribes*, who, after embracing the faith, renounced it, and returned to their former way of worship.

† Namely, *Fakeers*, or others who subsist by *begging*.

CAPITATION-TAX is not imposed upon *slaves*, *Mokátibs*, *Moddabbirs*, or *Am-Walids*, because *capitation-tax* is a substitute for destruction, with respect to *them*, and; with respect to *us*, it is a substitute for *aid* [in the wars of the faith;] now in conformity with the *first* of these, it would follow that *capitation-tax* *is* due from them, and, in conformity with the *second*, that it is *not* due; a doubt therefore arises with respect to its being due; and as this is the case, it is determined not to be incumbent upon them: neither is it incumbent upon their owner to pay *capitation-tax* for them, because he himself by their means pays an increased *capitation-tax*, as he through them becomes *rich*, or obtains a *mediocrity* of circumstances; and in either case he pays *capitation-tax* in a degree superior to the *labouring poor*.

nor is it imposed upon *slaves* of any description:

CAPITATION-TAX is not imposed upon *Rábibs*, (that is, Christian or Pagan *monks* and *bermits*, who do not mix with the rest of mankind:)—the same is mentioned by *Kadooree*: *Mohammed*, in the *Jama-Sagbeer*, reports from *Haneefa* that *capitation-tax* may be imposed upon those, where they are capable of labour, (and such is the opinion of *Abou Yoosaf*;) because where, being capable of labour, they refrain from it, they waste their ability; *capitation-tax*, therefore, is due from them, in the same manner as tribute from the landholder, where he (being able) suffers his land to remain untilled.—The reason for what is related by *Kadooree* is that a monk is not to be destroyed where he does not mix with mankind; and *capitation-tax*, with respect to them, would be for the purpose of warding off destruction.

nor upon *monks* or *bermits*.

If a person become a *Mussulman*, who is indebted for any arrear of *capitation-tax*, such arrear is remitted: and in the same manner, the arrear of *capitation-tax* due from a *Zimnee* is remitted upon his dying in a state of infidelity. *Shafei* holds that the tax is not remitted in either case; because it was due either in return for protection to the person, or in return for permission to reside in the *Mussulman* territory,

Arrear of *capitation-tax* is remitted, upon the subject's decease, or conversion to the faith.

territory; and the *Zimmee* or convert has continued under protection, and resided in the *Mussulman* territory: the return from him, therefore, is not to be remitted in consequence of the supervenient circumstance of death, or conversion to the faith; in the same manner, as in a case of *hire*, or of composition for blood;—in other words, if capitation-tax be a return for *residence*, it comes under the construction *hire*, and is not remitted in consequence of *death*, or conversion to the faith, in the same manner as if a *Zimmee* were to hire a house and reside therein for the period agreed upon, and then die, or embrace the faith, in which case the rent of the house does not cease; and so likewise with respect to capitation-tax:—or, if capitation-tax be a return for *protection to the person*, it comes under the construction of a composition for blood, and is not remitted in consequence of *death* or conversion to the faith, in the same manner as if a *Zimmee* were wilfully to kill a person, and afterwards enter into a composition for the murder with the friends of the deceased, for a certain consideration, and then become a *Mussulman*, or die, in which case the consideration is not remitted from him;—and so likewise capitation-tax, (which is the consideration for protection to his person,) is not remitted. The arguments of our doctors upon this point are threefold.—FIRST, the prophet has declared that “*capitation-tax is not incumbent upon Mussulmans*:”—SECONDLY, capitation-tax is a species of *punishment*, inflicted upon infidels on account of their infidelity, whence it is termed *Jizyat*, which is derived from *Jizya*, meaning *retribution*; now the *temporal* punishment of infidelity is remitted in consequence of conversion to the faith; and after death it cannot be inflicted, because temporal punishments are instituted solely for the purpose of removing evil, which is removed by either death or *Islām*:—THIRDLY, capitation-tax is a substitute for aid to the *Mussulmans*, and as the infidel in question, upon embracing the faith, becomes enabled to aid them in his own person, capitation-tax consequently drops upon his *Islām*.—With respect to the argument adduced by *Shafēi*, we reply that capitation-tax is neither a consideration for *protection to the person*,
nor

nor for *residence*, because protection to the person is established in virtue of humanity, and a *Zimmee* resides, in the *Mussulman* territory, within his own dwelling; wherefore the case does not admit that a consideration, for protection to his person, or for residence, should be exacted from him.

If a *Zimmee* owe capitation-tax for *two* years, it is compounded,—that is, the tax for *one* year only is exacted of him:—and it is recorded, in the *Jama-Sagbeer*, that if capitation-tax be not exacted of a *Zimmee* until such time as the year has elapsed, and another year arrived, the tax for the past year cannot be levied. This is the doctrine of *Haneefa*. The two disciples maintain that the tax for the past year may be levied. If, however, a *Zimmee* were to die near the close of the year, in this case the tax for that year cannot be exacted, according to all our doctors: and so likewise, if he die in the *middle* of the year, (which instance has been already treated of.) Some assert that the above difference of opinion obtains also with respect to tribute upon land: whilst others maintain that there is no difference of opinion whatever respecting it, but that it is not compounded, according to all our doctors.—The argument of the two disciples (where they dissent) is that capitation-tax is a *consideration*, (as was before said,) and if the considerations be numerous, and the exaction practicable, they are all to be exacted; and in the case in question the exaction of capitation-tax for the two years is practicable: contrary to where the *Zimmee* becomes a *Mussulman*, for in this case the exaction is impracticable.—The arguments of *Haneefa* upon this point are twofold. *FIRST*, capitation-tax is a sort of *punishment* inflicted upon infidels for their obstinacy in infidelity, (as was before stated;) whence it is that it cannot be accepted of the infidel if he send it by the hands of a messenger, but must be exacted in a mortifying and humiliating manner, by the collector sitting and receiving it from him in a *standing* posture: (according to one tradition, the collector is to seize him by the throat, and shake him, saying,

In a case of arrear for *two* years, *one* year's tax only is levied.

“ Pay your tax, *Zimmee!*”)—it is therefore evident that capitation-tax is a *punishment*; and where two punishments come together, they are compounded, in the same manner as in *Hidd*, or *stated punishment*. SECONDLY, capitation-tax is a substitute for destruction in respect to the *infidels*, and a substitute for personal aid in respect to the *Mussulmans*, (as was before observed;)—but it is a substitute for destruction with regard to the *future*, not with regard to the *past*, because infidels are liable to be put to death only in *future*, in consequence of *future* war, and not in *the past*. In the same manner, it is also a substitute for aid with regard to the *future*, because there is no necessity for aid in the *past*. With respect to what is quoted from the *Jama Sag-beer*—“ and another year arrive,” some assert that the passage is to be taken in its most extensive sense, that is to say, that it means—“ and another year *also* *pass*,” so as to make *two* years,—for it is there mentioned that capitation-tax is due at *the end* of the year, wherefore it is requisite that *another* year be elapsed, so as to admit of an accumulation of *two* year’s tax, after which the two years’ taxes are compounded:—Others, again, allege that the passage is to be taken in its *literal* sense; and as capitation-tax is held by *Haneefa* to be due upon the *commencement* of the year, it follows that by one year passing, and another arriving, an accumulation of the tax for *two* years takes place. It is certain that, with our doctors, capitation-tax is due on the *commencement* of the year,—and with *Shafei*, at the *end* of it, in the manner of *Zakat*. The argument of our doctors is that the thing for which the tax is a substitute has regard solely to the *future*, (as was before explained,) wherefore it cannot be due after the year has elapsed; whence it is that, with our doctors, capitation-tax is due on the *commencement* of the year.

The tax for the current year is due at the commencement of the year.

SECTION.

THE construction of *churebes* or *synagogues* in the *Mussulman* territory is unlawful, this being forbidden in the traditions:—but if places of worship originally belonging to *Jews* or *Christians* be destroyed, or fall to decay*, they are at liberty to repair them,—because buildings cannot endure for ever, and as the *Imám* has left these people to the exercise of their own religion, it is a necessary inference that he has engaged not to prevent them from rebuilding or repairing their churches and synagogues. If, however, they attempt to remove these, and to build them in a place different from their former situation, the *Imám* must prevent them, since this is an actual *construction*: and the places which they use as *bermitages* are held in the same light as their churches, wherefore the construction of those also is unlawful. It is otherwise with respect to such places of prayer as are within their dwellings, which they are not prohibited from constructing, because these are an appurtenance to the habitation. What is here said is the rule with respect to *cities*; but not with respect to *villages* or *hamlets*; because as the tokens of *Islám* (such as public prayer, festivals, and so forth) appear in cities, *Zimmes* should not be permitted to celebrate the tokens of infidelity there, in the face of them; but as the tokens of *Islám* do not appear in *villages* or *hamlets*, there is no occasion to prevent the construction of synagogues or churches there. Some allege that in our country† *Zimmes* are to be prohibited from constructing churches or synagogues, not only in *cities*, but also in *villages* and *hamlets*; because in the villages of our country various tokens of *Islám* appear; and what is recorded from *Hanefsa*, (that the prohi-

The construction of infidel places of worship in a *Mussulman* territory is unlawful; but those already founded there may be repaired.

* The case supposes a city or country conquered by the *Mussulmans*, and the inhabitants re-established in their possessions.

† *Upper Persia*, the country of the author.

bition against building churches and synagogues is confined to *cities*, and does not extend to *villages* and *hamlets*) relates solely to the villages of *Koofa*; because the greater part of the inhabitants of these villages are *Zimmees*, there being few *Mussulmans* among them, wherefore the tokens of *Islām* do not there appear: moreover, in the territory of *Arabia*, *Zimmees* are prohibited from constructing churches or synagogues either in *cities* or *villages*, because the prophet has said “*Two religions cannot be professed together in the peninsula of Arabia.*”

Restrictions
upon *Zimmees*
in point of
dress and *equi-
page*, &c.

It behoves the *Imām* to make a distinction between *Mussulmans* and *Zimmees* in point both of *dress* and of *equipage*. It is therefore not allowable for *Zimmees* to ride upon *horses*, or to use armour, or to use the same saddles and wear the same garments or head-dresses as *Mussulmans*; and it is written, in the *Jama Sagbeer*, that *Zimmees* must be directed to wear the *Kisteej* *openly*, on the outside of their clothes; (the *Kisteej* is a woollen cord or belt which *Zimmees* wear round their waists on the outside of their garments;)—and also, that they must be directed, if they ride upon any animal, to provide themselves a saddle like the panniers of an ass. The reason for this distinction in point of clothing and so forth, and the direction to wear the *Kisteej* *openly* is that *Mussulmans* are to be held in honour; contrary to *Zimmees*, who are not to be held in honour (whence it is that they are not saluted *first*;) and if there were no outward signs to distinguish *Mussulmans* from *Zimmees*, these might be treated with the same respect, which is not allowed. It is to be observed that the insignia incumbent upon them to wear is a *woollen* rope or cord tied round the waist, and not a *silken* belt.

Their wives
must not as-
sociate with
the wives of
Mussulmans.

It is requisite that the wives of *Zimmees* be kept separate from the wives of *Mussulmans*, both in the public roads, and also in the *baths*: and it is also requisite that a mark be set upon their dwellings, in order that beggars who come to their doors may not pray for them. The learned have also remarked that it is fit that *Zimmees* be not permitted

mitted to ride at all, except in cases of *absolute necessity*; and if a *Zimnee* be thus, of necessity, allowed to ride, he must alight wherever he sees any *Mussulmans* assembled; and if there be a necessity for him to use a saddle, it must be made in the manner of the panniers of an *ass*. *Zimnees* of the higher orders must also be prohibited from wearing rich garments.

If a *Zimnee* refuse to pay capitation-tax, or murder a *Mussulman*, or blaspheme the prophet, or commit whoredom with a *Musslima*, yet his contract of subjection is not dissolved; because the thing in virtue of which the destruction of *Zimnees* is suspended is the *submitting* to capitation-tax, not the actual *payment* thereof; and the *submission* to it still continues. *Shaf'ee* has said that the contract of subjection is dissolved by a *Zimnee's* blaspheming the prophet; because if he were a believer, by such blasphemy his faith would be broken*; and hence, in the same manner, his protection is thereby broken, since the contract of subjection is merely a substitute for *belief*. The argument of our doctors is that the blasphemy in question is merely an act of *infidelity* proceeding from an infidel; and as his infidelity was no obstruction to the contract of subjection at the time of making it, this supervenient act of infidelity does not cancel it.

A *Zimnee's* contract of subjection is not dissolved by his commission of a crime;

A CONTRACT of subjection is dissolved only by *Zimnees* absconding to the territory of the infidels, or making an attack upon the *Mussulmans*; in either of which cases the contract ceases to exist; because the advantage proposed from it is the removal of the evils of *war* and *bloodshed*; and this advantage ceases to exist upon their engaging in hostilities.

nor unless he abscond to the infidels, or attack the *Mussulmans*.

* That is, he would become a virtual *apostate*, and forfeit the protection and privileges of a *believer*. The consequence attending a breach of the contract of subjection is mentioned a little further on.

A ZIMNEE,

when he becomes liable to the same penalties with an apostate.

A ZIMMEE, upon breaking his contract of subjection, stands in the same predicament with an *apostate*,—that is, he is condemned to death upon absconding to the territory of the infidels, in the same manner as holds in the rule with respect to apostates. The rule also with respect to such property as he may carry off along with him into the said territory, is the same as with respect to the property of an apostate;—that is, if the *Mussulmans* afterwards conquer that territory, the property aforesaid is forfeited to the state, in the same manner as the property of an apostate:—but if the *Zimnee* be made captive, he is a *slave*: contrary to the case of an apostate, who, if he repent not, is put to death.

SECTION.

Christians of the *Togblib* tribe subject to double *Zakât*.

OF *Zakât* twice as much is levied upon the property of Christians of the *Binney Togblib* tribe as is levied upon the property of *Mussulmans*, because *Omar* made peace with them upon this condition, and this in the presence of the other companions, none of whom disputed it:—and in the same manner, twice as much is taken from the *women* of that tribe as from the *Mussulmans*, because the above peace established the taking of double *Zakât*, and *Zakât* is incumbent upon women; double *Zakât*, therefore, is exacted of the *women* of that tribe,—but *not* of the *children*, because *Zakât* is not incumbent upon children. *Ziffer* says that the *women* of that tribe are also exempted from this, (and such is likewise the opinion of *Shafëi*,) because the double *Zakât* in question is actually *capitation-tax*, as *Omar* declared to them “*This is JIZYAT, and name it which ever ye please, JIZYAT, or ZAKÂT;*” (whence it is that whatever is exacted from them is expended upon the same objects of expenditure as *capitation-tax*:)—it is therefore evident that this is *capitation-tax*, and women are not subject to it.—

The

The argument of our doctors is that the thing in question has been made obligatory by the terms of a peace, and women are capable of being subject to such obligations:—and with respect to what is urged by *Ziffer* and *Shafci*, that “whatever is exacted of them is expended “upon the same objects of expenditure as *capitation-tax*,” it may be replied that this is *not* applied to the purposes of the *Mussulmans*, as the property which is applied to the purposes of the *Mussulmans* is the property in the public treasury, to which the purposes of the *Mussulmans* is the object of expenditure, and this object of expenditure is not restricted to *capitation-tax* alone, so as to afford an argument of the thing in question being *capitation-tax*:—in short, the impost in question is not *capitation-tax*, and hence the conditions of *capitation-tax* are not regarded in the exaction of it.

CAPITATION-TAX is imposed upon the freedmen * of the *Binney-Toghlib* tribe, and also tribute upon their lands, although *capitation-tax* and tribute be not exacted from their masters; in the same manner as these imposts are levied upon the freedmen of the *Koreish* tribe, although a *Koreish* be not subject to them. *Ziffer* says that there is levied upon their property a twofold proportion of what is levied upon the property of *Mussulmans*, in the same manner as a twofold proportion is levied upon the tribe of *Binney-Toghlib*;—because the prophet has said “*The freedmen of any tribe are of that tribe*;” whence it is that it is unlawful to bestow alms upon the *freedmen* of the tribe of *Hashim*, in the same manner as it is unlawful to bestow it upon the *freemen* of that tribe†. Our doctors, on the other hand, argue that the exaction of a twofold proportion from the *Binney-Toghlib* tribe, by the terms of a peace, is an act of favour with respect to them; because that is not taken from *them* in the way that *capitation-tax* is taken from *Zimnees*, with humiliation and degradation; and a freedman is not connected with his master in any thing which is a favour

Rule of *capitation-tax*, with respect to *Toghlibs*, and *Koreishes*.

* *Arab. Mukticks*, meaning *emancipated slaves*. † Vol. I. p. 58.

to the master, whence it is that capitation-tax is imposed upon the freedman of a *Mussulman*, who is a Christian.—It is otherwise with respect to the prohibition of *alms*, because prohibition is established by *doubt*, whence it is that the freedman of a *Hasbimee* is connected with the *Hasbimee*, with respect to the prohibition of alms.

OBJECTION.—It would hence follow that alms are unlawful to the freedman of a rich person, in the same manner as they are unlawful to the rich person himself; whereas the case is otherwise.

REPLY.—Alms are not unlawful to the freedman of a rich person, because the rich person himself may be one to whom alms are lawful, but prohibited by *wealth*, which cause of prohibition does not exist with respect to his freedman:—a *Hasbimee*, on the contrary, is utterly incapable of receiving alms, as he is, by the dignity and superiority of his rank, precluded from accepting of them; and hence his freedman is connected with him as far as respects the illegality of alms.

Tribute, capitation-tax, and public presents, to be expended in defraying all public charges.

TRIBUTE, and all other exactions from the property of the *Binney-Toghlib* tribe, as well as the presents sent by foreigners to the *Imam*, together with capitation-tax, is expended upon the purposes of the *Mussulmans*, such as the construction of fortresses upon the *Mussulman* frontiers, building of bridges, and so forth.—Out of these, also, a sufficient allowance is to be paid to the *Mussulman* magistrates, public officers, and learned men.—Subsistence is also paid out of this property to the warriors, and their families; because the acquisitions in question are the property of the public treasury, as being obtained by the *Mussulmans* without *fighting*; and the property in the public treasury is reserved for the purposes of the *Mussulmans* and of the warriors in their service;—for the maintenance of a family rests upon the head of that family, wherefore if he do not receive what may suffice for their support, he will be under a continual necessity of seeking a subsistence for them, and consequently, by a variety of engagements, will be occasionally disabled from service.

IF any warrior, or other person, die in the middle of the year, having a subsistence appointed to him out of the public treasury, his heirs are not entitled to any of the pay so appointed for him, because this pay is a species of *gratuity*, and not a *debt*, (whence it is termed *Atta**,) and therefore does not become his property until he has obtained possession of it, and ceases upon his decease, and consequently is not an inheritance. If, however, a person die towards the *end* of the year, it is laudable to give his pay to his relations. (*Atta* is the appointed allowance entered in the books of the *Sultan*, for soldiers, and for the ministers of religion, who are, in the present times, *Kazees*, *Mooftees*, and *Doctors*†. In the beginning of *Islám*, *Atta* was appointed for any persons of distinction, such as the wives of the faithful, and the families of those who were persecuted.)

Arrears of pay cease upon the decease of the person to whom they are due.

CHAP. IX.

Of the Laws concerning *Apostates*.

WHEN a *Mussulman* apostatizes from the faith, an exposition thereof is to be laid before him, in such a manner that if his apostacy should have arisen from any religious doubts or scruples, those may be removed. The reason for laying an exposition of the faith before him is that it is possible some *doubts* or *errors* may have arisen in his mind, which may be removed by such exposition; and as there are only two modes of repelling the sin of apostacy, namely, *destruction* or *Islám*, and *Islám* is preferable to destruction, the evil is rather to be removed by means of an exposition of the faith;—but yet this exposition of the

An exposition of the faith is to be laid before an apostate;

* *Angelick*, BOUNTY.

† *Arab. Moedris*: a title for any learned person.

faith is not *incumbent**, (according to what the learned have remarked upon this head,) since a call to the faith has already reached the apostate.

who, if he re-
pent not with-
in three days,
is put to
death;

AN apostate is to be imprisoned for three days, within which time if he return to the faith, it is well: but if not, he must be slain.—It is recorded in the *Jama Sagbeer* that “an exposition of the faith is “to be laid before an apostate, and if he refuse the faith, he must be “slain:”—and with respect to what is above stated, that “he is to “be imprisoned for three days,” it only implies that if he require a delay, three days may be granted him, as such is the term generally admitted and allowed for the purpose of consideration. It is recorded from *Haneefa* and *Aboo Yoosaf* that the granting of a delay of three days is laudable, whether the apostate require it or not: and it is recorded from *Shafei* that it is *incumbent* on the *Imám* to delay for three days, and that it is not lawful for him to put the apostate to death before the lapse of that time; since it is most probable that a *Mussulman* will not apostatise but from some doubt or error arising in his mind; wherefore some time is necessary for consideration; and this is fixed at three days. The arguments of our doctors upon this point are twofold.—FIRST, God says, in the *Korán*, “SLAY THE UN- “BELIEVERS,” without any reserve of a delay of three days being granted to them; and the prophet has also said “*Slay the man who “changes his religion,*” without mentioning any thing concerning a delay: SECONDLY, an apostate is an *infidel enemy*, who has received a call to the faith, wherefore he may be slain upon the instant, without any delay. An apostate is termed on this occasion an *infidel enemy*, because he is undoubtedly such; and he is not *protected*, since he has not *required* a protection; neither is he a *Zimnee*, because capitation-tax has not been accepted from him; hence it is proved

* That is, it is lawful to kill an apostate without making any attempt to recover him from his apostacy.

that

that he is an *infidel enemy* *. It is to be observed that, in these rules, there is no difference made between an apostate who is a *freeman*, and one who is a *slave*, as the arguments upon which they are established apply equally to both descriptions.

whether he be a *freeman* or a *slave*.

THE repentance of an apostate is sufficiently manifested in his formally renouncing all religions except the religion of *Islam*, because apostates are not a *sect*: or if he formally renounce the religion which he embraced upon his apostacy, it suffices, since thus the end is obtained.

His repentance is established by a simple recantation.

If any person kill an apostate, before an exposition of the faith has been laid open to him, it is abominable, (that is, it is laudable to let him continue unmolested.) Nothing however, is incurred by the slayer; because the infidelity of an alien renders the killing of him admissible; and an *exposition* of the faith, after a *call* to the faith, is not necessary.

Nothing is incurred by the premature killing of an apostate.

If a *Mussulman* woman become an apostate, she is not put to death, but is imprisoned, until she return to the faith. *Shafei* maintains that she is to be put to death; because of the tradition before cited;—and also, because, as men are put to death for apostacy solely for this reason, that it is a crime of great magnitude, and therefore requires that its punishment be proportionably severe, (namely, *death*,) so the apostacy of a woman being likewise (like that of man) a crime of great magnitude, it follows that *her* punishment should be the same as that of a *man*. The arguments of our doctors upon this point are twofold.—FIRST, the prophet has forbidden the slaying of women, without making any distinction between those who are *apostates*, and those who are *original infidels*. SECONDLY, the original principle in the retribution of offences is to delay it to a future state, (in other words, not to inflict punish-

A female apostate is imprisoned until she returns to the faith.

* *Arab. Hirbee*; a term which the translator has generally rendered *alien*, and which applies to any infidel not being a subject of the *Mussulman* government.

ment *here*, but to refer it to *hereafter*,) since if retribution were executed in this world, it would render defective the state of *trial**, as men would avoid committing sin from apprehension of punishment, and therefore would be in the state of persons acting under compulsion, and not of *free agents*: but in the case of apostasy of *men* the punishment is not deferred to a future state, because it is indispensably requisite to repel their present wickedness, (namely, their becoming enemies to the faith,) which wickedness cannot be conceived of *women*, who are, by natural weakness of frame, incapable thereof: contrary to *men*.—A female apostate, therefore, is the same as an original female infidel; and as the killing of the one is forbidden, so is the killing of the other also. She is however to be imprisoned, until she return to the faith; because, as she refuses the right of God after having acknowledged it, she must be compelled, by means of imprisonment, to render God his right, in the same manner as she would be imprisoned on account of the right of the individual. It is written in the *Jama Sagheer*,—"A female apostate " is to be *compelled* to return to the faith, whether she be *free*, or a " *slave*."—The slave is to be compelled by her *master*:—she is to be *compelled*, for the reasons already recited; and this compulsion is to be executed by her *master*, because in this a regard is had to the right both of God and of the master. It is elsewhere mentioned that a female apostate must be daily beaten with severity until she return to the faith.

An apostate's right over his property is *suspended*, and not *destroyed* until his *decease*.

AN apostate's right over his property is dissolved by his apostasy, by a *suspended* dissolution: if, therefore, he again become a *Mussulman* he again becomes endowed with a right over his property, in the same manner as before. Lawyers observe that this is an opinion of *Haneefa*. According to the two disciples, his right over his property is not dissolved, because he is necessitous, and also liable to de-

* Meaning that *probation* which is the chief design of the present state of man.

mands; and it is requisite that such a person's right over his property be not dissolved, since a person not possessed of this right is incapable of answering such demands as may be made upon him: his right over his property, therefore, endures until he be put to death, in the same manner as that of a person under a sentence of *retaliation*, or of *lapidation*. The argument of *Haneefa* upon this head is that an apostate is an *infidel enemy**, and is in our hands until he be put to death. Now the killing of him is only lawful in consequence of his shewing himself an *enemy*: and this circumstance proves that his right over his property is destroyed; but yet, as his being invited back to the faith affords room to hope that he may again become a *Mussulman*, it is for that reason said that his right over his property is dissolved by a *suspended* dissolution. If, therefore, he again become a *Mussulman*, it is accounted the same as if he were always a *Mussulman*, and he stands, (with respect to the *dissolution of his right*,) as if he never had apostatised, that is, the apostacy which occasioned a destruction of his right is in this case of no effect. If, however, he do not again become a *Mussulman*, but die or be slain in his apostacy, or abscond to a foreign country, and the *Káree* issue a decree of expatriation† against him, his infidelity becomes then confirmed and established, and the cause above-mentioned takes effect in the destruction of his right, and his right is destroyed accordingly.

If an apostate die or be slain in his apostacy, his property acquired during his profession of the faith goes to his heirs who are *Mussulmans*, and whatever he acquired during apostacy is public property of the community of *Mussulmans*,—that is, it goes to the public treasury.—This is according to *Haneefa*. The two disciples allege that his

Upon an apostate dying, his property acquired in apostacy becomes forfeited to the state; and the

† Literally, "issue a decree *convening him with a hostile country*." The term *expatriation* is adapted by the translator, as the decree in question does not amount to *banishment*, but only to a suspension of *civil life*.

rest goes to
his heirs,

property of both descriptions goes to his heirs who are *Mussulmans*. *Shafei*, on the other hand, holds that they are both public property, because he died in a state of infidelity, and a *Mussulman* cannot inherit of an infidel; and as he is an *infidel enemy*, his property is forfeited to the *public*,—that is, to the *state*. The argument of the two disciples is that what the apostate acquired during his profession of the faith, and also, what he acquired during his apostacy, are both equally his property until his decease, for the reason already mentioned: the *whole* of his property, therefore, devolves to his heirs in consequence of his decease, in virtue of their right of inheritance resting upon a time when he was not an apostate; because apostacy occasions death, and hence it is placed in the same state as if he had acquired the whole property during his profession of the faith: and as his heirs are heirs to that property from the period of his profession of the faith, it follows that a *Mussulman* inherits of a *Mussulman*, not that a *Mussulman* inherits of an *infidel*.—The argument of *Haneefa* is that the succession to inheritance, in such a way that a *Mussulman* inherits of a *Mussulman*, is possible with respect to the property acquired during *Islâm*, as that property existed before apostacy, which was a species of civil death: but this succession to inheritance is not in such a way possible, with respect to the property acquired during apostacy, because this property did not exist whilst the person in question professed the faith; and the existence of the property during his profession of the faith is a condition of succession to inheritance.—It is necessary to observe that no person can inherit of an apostate but one who was competent to inherit at the time of his apostacy, by being then *free* and a *Mussulman*, and who continued of this description till the time of the apostate's decease or desertion into a foreign state. This is recorded from *Haneefa* by *Hoofn-Bin-Zeeyâd*, and proceeds upon the ground that in inheritance regard is had to *succession*; and in succession it is a condition that the successor be first certified, and then his succession declared; and it is requisite that the qualities which entitle to inheritance exist in the successor at the time of certifying his right to succession,

who must
have been
qualified to
inherit at the
time of his
apostacy.

succession, which are, his being a *Mussulman* and *free*. It is also a requisite that these qualities exist in him at the period of succession; inasmuch that, if any of the apostate's relations were to become *Mussulmans* upon his apostacy, or if a child be born to him begotten in his apostacy, they cannot (according to this doctrine) inherit of him. There is, however, *another* doctrine of *Haneefâ* recorded upon this head, which is, that any person inherits of the apostate who was entitled to inherit of him at the time of his apostacy; and that the continuance till the time of his decease of those qualities which entitle to inheritance is unnecessary;—according to which doctrine the right of the person entitled to inherit of the apostate at the time of his apostacy is not annulled by his decease*, but *his* heir steps in as his substitute, because apostacy is a species of death, and hence in establishing the right to inheritance the *period of apostacy* is regarded. This is the substance of what is said by *Abou Yoosuf*.—A *third* doctrine is that regard is had to the *existence* of the heir at the time of the apostate's death or desertion into the enemy's country; and such is the opinion of *Mohammed*, who has said in the *Mabsoot* that this is the most approved doctrine, because whatever occurs *posterior* to the *existence* of a cause, but *before* the *completion* thereof, stands in the same predicament with that which occurs *previous* to the existence of the cause;—in the same manner as a child born of a purchased slave previous to the seizure of the purchaser;—that is, a child born of a purchased female slave posterior to the purchase, but previous to the seizure of the purchaser, is considered as existing at the time of the contract of sale, so far as to be a subject of the contract, and to have a part of the price set against it:—contrary to where it is born *subsequent* to seizure.—An heir, therefore, discovered *subsequent* to the apostacy, is in the same predicament with one who existed *previous* to the apostacy, and at the time of the apostate's professing the faith; and consequently inherits of the apostate.

* That is, supposing him to die in the interim between the date of the apostacy and the death of the apostate.

The *Mussul-*
man wife of
an apostate in-
herits of him.

THE wife of an apostate, being a *Muslimâ*, inherits of him, where he die or be slain during her *edit* from *séparation* in consequence of his apostacy, because the husband, in this case, becomes an *evader**, although he be not *sick* at the time of his apostacy.

The *whole* of
a female apos-
tate's pro-
perty goes to
her heirs.

THE property left by a female apostate goes to her heirs, whether it have been acquired during her profession of the faith, or in her apostacy; because the woman's person is inviolable†; and the protection of her blood is not destroyed by her apostacy; (whence it is that she is not put to death;) and as the protection of her blood still holds good, and her person continues inviolable, it follows that the protection of her *property* also is not destroyed, (since *property* is a *dependant* of the person;)—and hence her property does not become forfeited to the *state*.—It is otherwise in the case of a *male* apostate; because he (according to the doctrine of *Haneefa*) has made a distinction between his property acquired during *Islâm*, and his property acquired during *apostacy*,—as a *male* apostate is liable to be put to death.

A *Mussulman*
does not in-
herit of his
apostate wife,
unless she
apostatized du-
ring sickness.

THE husband of a female apostate (being a *Mussulman*) inherits of her, provided she have apostatized during sickness, with a view to invalidate her husband's right:—but if she have apostatized whilst in *health*, her husband cannot inherit of her, because a female apostate is not put to death for her apostacy, and hence her husband's right does not, in consequence of her apostacy, become connected with her property:—contrary to the case of a *male* apostate.

Upon an
apostate be-
ing expatri-
ated his *Am-
Wahdi*.

IF an apostate go off to a foreign country, and the magistrate issue a decree uniting him to the infidels, his *Moodâbbirs* and *Am-Wahids* are free, and his deferred debts become und deferred, (that is, the pay-

* For a full explanation of this term, see Vol. I. p. 283.

† Arab. *Mafsem-al-dam*: that is, of *protected blood*; meaning, not liable to be slain (on account of her *apostacy*.)

ment of them becomes immediately due,)—and his property acquired during his profession of the faith goes to his *Mussulman* heirs. *Shafëi* maintains that his property continues in suspense; because his expatriation is merely a species of *absence*, and therefore operates in the same manner as his absence within the *Mussulman* territory; and as in the *latter* case his property remains in suspense, so in the *former* case likewise. The argument of our doctors is that an apostate, by going into a foreign country, becomes an alien; and as aliens are the same as the dead with respect to the laws of *Islâm*, on account of the termination of the power of subjecting themselves to those laws, (in the same manner as that power ceases with the *dead*,) a desertion to a foreign country amounts to *death*. His desertion however to the foreign country is not confirmed but by a decree of the magistrate, as there is still a possibility of his returning into the *Mussulman* territory, and hence it is requisite that the *Kâzee* issue a decree, uniting him to the foreign country, so that such union may be confirmed and become established:—and as his desertion to a foreign country stands (upon the *Kâzee*'s decree) in the place of his death, those things which have a connexion with death do then become established, (namely, the freedom of his *Modabbirs*, and so forth, as aforesaid) in the same manner as they become established upon his *actual decease*. In taking possession of the inheritance, *Mohammed* has regard to the heir being entitled to inherit *at the time of the apostate's desertion*, because it is such desertion which is the occasion of the inheritance, no regard being had to the decree of the *Kâzee* farther than as being a *confirmation* thereof,—in other words, by the *Kâzee*'s decree all possibility of a return into the *Mussulman* territory is cut off, and the desertion becomes confirmed. *Abou Yousaf*, on the other hand, maintains that regard is had to the heir being entitled to inherit *at the time of the Kâzee's decree*, because the apostate is accounted as *dead* upon the *Kâzee* issuing such decree. The same difference of opinion obtains where a *female* apostate absconds into a foreign country.—The debts contracted by the apostate during his adherence to the

and *Modabbirs* are free; and his property acquired in *Islâm* goes to his heirs; and all his debts become immediately payable:

and the same of a *female* apostate who absconds.

Rule in the discharge of

an apostate's
debts.

faith are to be discharged out of his property acquired during the same, and the debts contracted during his apostacy are to be discharged from his property acquired in apostacy. The compiler of the *Hedaya* remarks that this is one opinion of *Haneefa*.—Another opinion recorded from him is that his debts are all to be discharged from the property acquired during his adherence to the faith; and if that be not sufficient, but a part of the debts still remain unpaid, then such remaining debt is to be discharged out of the property acquired during apostacy.—There is also a *third* opinion recorded from him, the reverse of this.—The reason for the *first* of these opinions is that each of those two descriptions of debt has been contracted on a distinct and separate account, as the debts incurred during adherence to the faith have been contracted in the course of transactions undertaken for the acquisition of property during adherence to the faith, such as purchase, sale, and so forth,—and in the same manner, the debts incurred during apostacy have been contracted in the course of transactions undertaken for the acquisition of property during apostacy; and as the *cause* of incurring each description of debt is different, each is respectively to be discharged from the property acquired by the transaction in the course of which the debt was incurred: the debt, therefore, contracted during adherence to the faith is discharged out of the property acquired during adherence to the faith;—and the debt contracted during apostacy is discharged out of the property acquired in apostacy, as the cause of the acquisition of each property, respectively, is the cause of each description of debt being incurred.—The reason for the *second* opinion is that the property acquired by the apostate during his adherence to the faith is *his right*, whence it is that his heir becomes proprietor thereof by succession: now it is a condition of succession that the property descending be free from incumbrance on the part of the original possessor; and as his debts are an incumbrance upon it, the payment of those precedes the right of the heirs:—but as the property acquired during apostacy is not *his right* (the power of appropriation being destroyed by apostacy, according

ing to *Hancefa*,) his debts are not to be discharged from that except where they cannot be discharged out of the other property, in which case what remains unpaid is to be discharged out of this property;—in the same manner as where a *Zimmee* dies without heirs, in which case his property goes to the collective body of *Mussulmans*; but yet if any debts lie against the *Zimmee*, such debts are previously to be discharged out of his estate; and so also, the property acquired by the apostate during apostacy is not *his property*, but if, notwithstanding, any debts lie against him, the discharge of which cannot be effected from his other property, such debts are to be discharged out of the afore-said property.—The reason for the *third* opinion is that the property acquired by an apostate during his adherence to the faith is the right of his heirs;—but the property acquired during his apostacy is purely *his own* right, wherefore the payment of his debts is first made out of this property, except where this is impracticable, (from the property not sufficing for that purpose,) in which case the remainder of them is to be discharged out of the property acquired during adherence to the faith, as *his* right precedes the right of *his heirs*.

OBJECTION.—It was before understood that the property acquired by an apostate during apostacy is not *his right*; but here it is asserted that it is “purely *his own right*,”—which is a contradiction.

REPLY.—The expression that the property is “purely *his own right*,” implies only that *the right of others is not connected with it*, in the manner that the right of another is connected with the property of a *dying* person; nor does it hence follow that the property in question is *his right*, so as to occasion a contradiction.—The two disciples maintain that his debts are to be discharged out of his property of both descriptions, since both (according to *their* tenets) are equally *his right*, whence it is that the right of his heirs extends to both.

ALL acts of an apostate with respect to his property, (such as *purchase, sale, manumission, mortgage, and gift*,) done during his apostacy, are suspended in their effect. If, therefore, he become a *Mussulman*, those acts are valid; but if he die, or be slain, or desert into a foreign

Certain acts
of an apostate
are suspended
in their effect.

country, those acts are null. This is the doctrine of *Haneefa*. The two disciples say that those acts on his part are lawful in either case, that is, whether he become a *Mussulman*, or die, or be slain, or desert into a foreign country. It is here proper to observe that the acts of an apostate are of *four kinds*. **FIRST**, those which are universally admitted to be of authority, such as claim of offspring, and divorce,—because claim of offspring does not depend upon *actual right of property*, insomuch that if a father lay claim to a child born of his son's female slave, his claim is valid, and the female slave becomes his *Am-Walid*, although she be not his *actual property*, but he has a *dubious property* in her;—and so also, divorce does not depend upon a complete power, since divorce proceeding from a *slave* is lawful, although his power be defective.

OBJECTION.—Upon the instant of his apostasy, separation takes place between the husband and wife: how, then, can he pronounce divorce upon her?

REPLY.—This supposes a case where the husband and wife apostatise together; as is mentioned in the *Kifsee*.

—**SECONDLY**, those which are universally held to be null, such as marriage and sacrifice, because the validity of marriage and sacrifice depend upon the person's sect, and an *apostate* is of *no sect*.—**THIRDLY**, those which are universally held to remain *suspended* in their effect, such as contracts of copartnership, as the validity of these depends upon similarity of religion, and there is no similarity between the religion of a *Mussulman* and that of an *apostate*.—**FOURTHLY**, those concerning the suspension of which there is a difference among our doctors, *Haneefa* holding that they *are* suspended, and the two disciples, that they *are not* suspended; and these are the acts before-mentioned, namely, *purchase, sale, manumission, mortgage, and gift*.—The argument of the two disciples is that the legality of those acts depends upon competency, and the validity of them upon the right of property: now there is no doubt of *competency* appertaining to an apostate, since he is subject to the same civil obligations with other people; and in the same manner (according to them) there is no doubt concerning his power of possessing, since (by their tenets) 'his right

right over property continues unaffected until his death, according to what was before stated, that "he is necessitous, and also liable to demands," (to the end;)—his right over his property, therefore, still endures, whence if a child be born of his *Mussulman* wife within *six months* from the date of his apostacy, such child inherits of her; but if his child die after his apostacy and before his decease, such child does not inherit of him;—and such being the case, his acts, as aforesaid, are legal and valid. According to *Abou Yoozaf* the acts of an apostate in a state of health are lawful, because it is probable that he may again become a *Mussulman*, upon perceiving his error, and consequently may not suffer death; and such being the case, a *male* apostate is, with respect to all acts, in the same predicament as a *female*. *Mohammed*, on the other hand, holds that the acts of an apostate are legal and valid, in the same manner as the acts of a sick person, because it is not probable that a person who is converted and embraces any religious persuasion will readily abandon it, especially where he embraces it after having forsaken his former faith in which he has been educated; it is therefore most probable that he will suffer death for his apostacy: contrary to a *female* apostate, she not being liable to be put to death.—The argument of *Haneefa* is that an apostate's right over his property is dissolved by a suspended dissolution, (as was before stated,) and the dissolution or continuance of this power remaining in suspense, it follows that the acts in question also remain suspended in their effect, as they are founded upon the right. An apostate, moreover, is (according to *Haneefa*) in the same predicament with a hostile infidel who comes into the *Mussulman* territory without a protection; because an apostate is also a *hostile infidel*, and is in the *Mussulman* territory without a protection; and as the hostile infidel is liable to be imprisoned and prosecuted, and his acts remain suspended, until it be seen whether he is made a slave, or slain, or released out of courtesy, so in the same manner the acts of an apostate remain suspended, until it be seen whether he become a *Mussulman*, or be slain in his apostacy. In reply to the arguments of the two disciples, we observe that

that an apostate is liable to be put to death in consequence of the abrogation of his protection, in the same manner as a hostile infidel, who comes into the *Mussulman* territory without a protection, is liable to be put to death, from being destitute of protection to his person;—and the exposure to death for such a reason occasions a doubt with respect to the competency of the person who is liable to it. It is otherwise in the case of an *adulterer* or a *murderer*, because, although these be liable to death, yet their being so is not in consequence of *destruction to the protection of their persons*, but as a retribution for their offence; and as this does not occasion any doubt respecting their competency, their acts are all legal and valid.—It is otherwise, also, with respect to a *female* apostate, because, as she is not accounted an *infidel enemy*, she is not liable to be slain.

An abandoned apostate, again embracing the faith, and returning into the *Mussulman* territory, may reclaim such of his property as is remaining in the hands of his heirs.

If an apostate, after a decree being issued uniting him to the infidels, become a *Mussulman*, and return into the *Mussulman* territory, he may take back whatever of his property he finds remaining in the hands of his heirs, because the heirs have not taken the same, in virtue of their right of succession, for any other reason than as he has no further occasion for it; but when, becoming a *Mussulman*, he returns into the *Mussulman* territory, he has occasion for the property; and as his necessity precedes the right of the heirs, he may resume the property out of their hands.—It is otherwise where there is no property remaining in the hands of the heirs, for in this case he is not entitled to seek indemnification from them, because the heir has expended the property, from his own possession, at a time when it was lawful for him so to do: neither does the above rule apply to his *Am-Walids* or *Modabbirs*, because they are free, and the apostate is not at liberty to recover them, as the decree of the *Kâzee*, awarding their freedom, has been rendered valid by the circumstance which imparts to it that property^{*}, and hence cannot be reversed.

* Probably, meaning, *his desertion to a foreign country*.

IF an apostate who had deserted into a foreign country, becoming a *Mussulman*, come back into the *Mussulman* territory, before the *Kazee* shall have issued any decree respecting him, in this case it is accounted the same as if he had continued uniformly a *Mussulman*, and had never apostatised; as was before-mentioned.

IF an apostate have carnal connexion with a Christian female slave, who had been in his possession during his adherence to the faith, and this slave produce a child after *more* than six months from the date of his apostacy, and he claim the child, in this case the slave becomes his *Am-Walid*, and the child is his child, but yet does not inherit of him. If, however, the female slave become a *Muslimá*, the child inherits of him, upon his death, or expatriation. His *claim of offspring* * is valid, for this reason, that the validity of a claim of offspring does not depend upon *actual possession*, (as was before stated:)—and the child's inheriting where the mother is a *Muslimá*, and *not* inheriting where she is a *Christian*, is because the child of an apostate is a dependant on the *father* where the mother is a *Christian*, (since the father is more nearly related to *Islám*, as compulsion will be used to make him return to the faith, and it is probable that he may again become a *Mussulman*;) and such being the case, the child is accounted the same as an apostate, and an apostate cannot inherit of an apostate; but where the mother is a *Muslimá*, the child is a *Mussulman*, as a dependant on the mother,—and a *Mussulman* may inherit of an *apostate*.

Case of a child born of the slave of an apostate.

IF an apostate go off, with his property, into a foreign country, and the *Mussulman* forces afterwards obtain possession of that pro-

The property of an absconded apostate.

* *Arab. Isfelád*: the term of law for a master laying claim to (or acknowledging) a child born of his female slave, and declaring it to be of his own begetting, which legalises the child to him. It is treated of at large under the head of *Mumumissum of Slaves*.

tate, upon being taken, is the right of the state.

perty*, in this case such property is plunder, and the right of the state:— but if the apostate *first* desert to the foreign country, and *then* come into the *Mussulman* territory and take his property, and carry it off into the foreign country, and the *Mussulman* forces afterwards obtain possession of that property, and the apostate's heirs discover it before the general distribution†, in this case it must be delivered to them; because, in the *former* case, the property is a property in which no inheritance had ever existed, whereas, in the *latter* case, inheritance had existed, (whence it became the property of the heirs upon the *Kázee's* decree of outlawry) and therefore the heir is, in fact, already the *proprietor* of it.

A contract of *Kitábat* entered into by the son of an absconded apostate holds good.

If an apostate desert to a foreign country, leaving a slave in the *Mussulman* territory, and the *Kázee* decree the slave to belong to his son, and the son constitute the slave a *Mokátib*, and the apostate afterwards, becoming a *Mussulman*, return into the *Mussulman* territory, the *Akid Kitábat* or contract of ransom is lawful; but the ransom, as well as the *Willa*-right over the *Mokátib*, appertains to the reconverted apostate;—because the contract of ransom was legal and valid, as the son constituted the slave a *Mokátib* after the *Kázee's* decree of expatriation, and the slave then fell under the son's absolute authority, whence it is that the contract is *legal*. The son, therefore, who is his father's heir, is made to stand as his *agent*: now the rights of a contract appertain to the *constituent*, and hence the ransom belongs to the father; and as the slave becomes liberated upon paying his ransom, the *Willa*-right rests with him of course, since the *Willa* of emancipation rests with the person from whom the slave becomes emancipated.

* That is to say, *take it in war*, in a military excursion against the people of that country.

† Of the spoil, at the end of the excursion.

IF an apostate slay any person accidentally, and then desert to a foreign country, or be slain in his apostacy, the fine of blood is due only from his property acquired during his adherence to the faith, according to *Haneefa*.—The two disciples hold that it is due from his property of every description,—(that is, both from that acquired during his adherence to the faith, and also, from that acquired in apostacy,)—because the tribe of an apostate are not liable for the fine of his offence, since the tribe never pay the fine imposed upon a murderer, unless where a connexion still subsists between them; and as no connexion continues between the apostate and his tribe, the fine for the apostate's offence falls upon his property:—for the two disciples hold that property of either description is *his property*, and, of course, that inheritance holds equally in both (as was formerly mentioned;) whereas *Haneefa*, on the contrary, maintains that nothing is his property except what he acquired during his adherence to the faith,—and that, as the property acquired during his apostacy does not belong to him, inheritance does not hold with respect to it, but it is forfeited to the state.

Accidental homicide by an apostate is atoned for from his property acquired in *Islam*.

IF a person wilfully cut off the hand of a *Mussulman*, and the *Mussulman* afterwards apostatize, and then die in his apostacy in consequence of the loss of his hand,—or go off to a foreign country, and the *Kázee* issue a decree of expatriation against him, and he afterwards become a *Mussulman* and return into the *Mussulman* territory, and then die in consequence of the loss of his hand,—in either case *an half fine* only is due from the maimer to the apostate's heirs:—IN THE FIRST INSTANCE, because no regard is had to the *consequence* of the act of maiming, as this consequence followed upon an unprotected subject, (namely, the *person of an apostate*,) wherefore nothing is regarded but the original act of maiming, which took place during the adherence of the deceased to the faith, at which time he was in a state of protection, whence an *half fine* is due:—contrary to where a person cuts off the hand of an *apostate*, and the apostate afterwards becomes a

An *half fine* only is due for an offence committed upon the person of a *Mussulman* who afterwards apostatizes, and then returns to the faith, and dies;

and nothing is due for an offence com-

mitted upon
the person of
an *actual apos-
tate*, in the
same circum-
stance:

unless where
no decree has
been issued by
the *Kāzee*; in
which instance
a *complete fine*
is due, in case
of the conver-
sion and death
of the apos-
tate.

Mussulman, and then dies in consequence of the loss of his hand; for in this case no fine whatever is due, because here the act occurred during apostacy, and is therefore *biddir**, and of no account; and a thing which is *biddir* cannot afterwards obtain any regard;—for as a thing which is in itself worthy of regard may become *biddir*, (as where the avenger of blood discharges the offender) so in the same manner an act is rendered *biddir* by apostacy;—and IN THE SECOND INSTANCE, because the apostate is in this case accounted as *dead*, and death precludes the consequence;—that is, if a person cut off another's hand, and this person die from some *other* cause, the consequence of the maiming can never take place;—wherefore in this case also no regard is had to any thing but the *maiming*, on account of which an *half-fine* is due; and no regard is had to the consequence after his again becoming a *Mussulman*, which is a species of re-animation to him, because, as his becoming again a *Mussulman* in this manner is a *new birth* to him, no effect can afterwards take place from the former offence. This is where the *Kāzee* has issued a decree uniting him to the infidels. But if the *Kāzee* have *not* issued any such decree, whether the apostate abscond to a foreign country or not,—and he become a *Mussulman*, and then die, in consequence of the loss of his hand, in this case a complete fine is due from the maimer. This is the doctrine of the two *Elders*. *Mohammed* and *Ziffer* maintain that in all these cases an *half* fine is due, because, from the maimed person apostatizing *after* the loss of his hand, any effect attending the maiming becomes *biddir*, and does not afterwards occasion a complete fine in consequence of his becoming a *Mussulman*, any more than where a person strikes off the hand of an *apostate*, and he becomes a *Mussulman*, and dies in consequence of the loss of his hand. The argument of the two *Elders* is that, in the case in question, the offence of maiming was committed upon a person who from being a *Mussulman* was, at the time of maiming, in a state of protection, and its *consequence* also takes

* Shedding blood, or permitting it to be shed, unrevenged.

place upon a protected person, as the person maimed is a *Mussulman* at the time of his decease, wherefore a *complete fine*, (being the responsibility for the person) is due, in the same manner as it would be due if he never had apostatized. The ground of this is that no regard is had to the permanency of protection throughout the duration of the offence, regard being had to the existence thereof only at the time of the cause taking place (the *maiming*, for instance,) and at the time of the establishment of the effect of that cause. Now the time of *duration* of the offence is neither the time of the cause taking place, nor of the establishment of the effect of that cause, and therefore no regard is had to the permanency of protection throughout the duration of the offence; in the same manner as no regard is had to the permanency of property throughout the duration of a vow;—that is,—if a man say to his slave, “If you enter this house, you are free,” and he afterwards *sell* that slave, and again purchase him, and the slave then enter the house, he is free, although after the vow, and in its duration, he had not been in the possession of that person.

If a *Mokâtib* become an apostate, and desert to a foreign country, and there acquire property, and be afterwards made a captive with such property, and brought back, and refuse to embrace the faith, and do not become a *Mussulman*, he is to be put to death; and the property is to be paid to his owner in discharge of his ransom;—but if any thing remain after discharging the ransom, it goes to his heirs, according to all the doctors. This, according to the tenets of the two disciples, is evident; because, as they hold that whatever is acquired by an apostate belongs to him if he be *free*, so in the same manner, whatever is acquired by an apostate belongs to him, if he be a *Mokâtib*: and it is so according to *Haneefa* likewise; because a *Mokâtib* is proprietor of his own requisitions solely in virtue of his contract of ransom; and as this contract is not suspended by his apostacy, but continues in full force, so in the same manner his power over property is not suspended by his apostacy, he continuing proprietor

Case of a *Mokâtib* apostatizing and deserting to a foreign country.

of his own acquisitions; and his acquisition, as being his own property, must be applied to the discharge of his ransom; and whatever may remain goes to his heirs; for this reason, that as the acts of a *Makûtib* are not suspended by the *stronger* obstruction, (*slavery*,) it follows that they are not suspended by the *weaker* obstruction, (apostacy,) *a fortiori*.—Bondage is here termed the *stronger* obstruction, and apostacy the *weaker*, as several acts of an apostate are universally admitted to be legal and valid, such as the *claim of offspring*; for instance, as was formerly stated, (and most of his acts, such as *sale*, *purchase*, and so forth, are by the two disciples held to be so,)—whereas no act whatever of a *slave* is of any force.

The descendants of an absconded apostate, in a foreign country, on being captured, are the property of the state.

Cases in which the grandfather may be made the father's substitute in respect to a child.

If a husband and wife both apostatize, and desert to a foreign country, and the woman become pregnant there, and bring forth a child, and to this child another child be afterwards born, and the *Mussulman* troops then subdue the territory, the child and the *child's* child both are plunder, and the property of the state:—the *child* is so, because as the apostate mother is made a slave, her child is so likewise, as a dependant on her;—and the *child's* child is so, because he is an original infidel and an enemy; and as an original infidel is *fec*, or the property of the state, so is *he*: the *woman's* child may moreover be *compelled* to become a *Mussulman*, but not the *child's* child. *Hassan* records from *Hancefa* that compulsion may be used upon the *child's* child also, to make him embrace the faith, as a dependant of the *grandfather*.—It is to be observed that there are four things respecting which, (according to a tradition of *Hassan*,) the *grandfather* may be made the father's substitute,—and according to the *Zâbir Rawdyet* he may *not* be made the father's substitute;—*first*, *Islâm*,—*secondly*, *Sadka-fittir*,—*thirdly*, devolution of *Willa*,—and *fourthly*, bequests to relations.—The case of *Islâm* is stated above;—the case of *Sadka Fittir* is, that if a father be poor, or a slave, and the *grandfather* be rich, and free, the *Sadka-fittir* of the grandchild is incumbent upon the grandfather, according to *Hassan*,—but according to the *Zâbir*

Rawdyet

Rawdyet it is not incumbent. The case of devolution of *Willa* is that when a slave marries an emancipated female slave, and they have a child, the *Willa* of the child rests with the *Mawla* of the mother, but if the father be afterwards emancipated, the *Willa* of the child devolves upon the *Mawla* of the father; and if the *father* be not emancipated, but the *grandfather*, the *Willa* devolves upon the *Mawla* of the grandfather, according to *Hassan*,—but according to the *Zábir Rawdyet* it does not so devolve. And the case of *bequests to relations**, the that if any person make a will in favour of “his relations,” the father and mother are not included in it:—now the question is whether the *grandfather* be included in it or not?—according to *Hassan* he is included; but according to the *Zábir Rawdyet* he is excluded, in the same manner as the *father*.

THE apostacy of a boy, who though under age is yet arrived at years of discretion, is also regarded, according to *Haneefa* and *Mohammed*; and he may be compelled to return to the faith; he is not, however, to be put to death, but must be imprisoned. In the same manner, regard is paid to the *Islám* of a boy of the same description, for which reason he cannot inherit of his parents if they be infidels. *Aboo Yoosaf* says that his *Islám* is regarded, but not his apostacy. *Ziffer* and *Sbaféi*, on the other hand, maintain that no regard is paid either to his *Islám* or his apostacy. The arguments of *Ziffer* and *Sbaféi* upon this point are twofold:—FIRST, the boy is a *dependant* on his father and mother in *Islám*, and therefore cannot be considered as *original* in it, since between *dependancy* and *originality* there is a contradiction:—SECONDLY, if his *Islám* be regarded, he is subject to certain effects from it which are injurious to him, such as incapacity to inherit [of an infidel,] and separation from a wife who is an idolater; and hence he is not accounted as one of the *Mussulmans*. The arguments of *Haneefa*, *Aboo Yoosaf* and *Mahommed* in support of regard

* This supposes the term *relations* to be mentioned in a will generally, and without any specification.

being

A boy who apostatizes is not put to death, but must be imprisoned, provided he be arrived at years of discretion.

being had to his *Islâm* are also twofold:—FIRST, *Alee* embraced the faith whilst he was yet a boy; and the prophet considered his *Islâm* as valid and sufficient, inasmuch that *Alee* obtained much honour by the action:—SECONDLY, the boy acknowledges the faith in his heart, and testifies to it with his lips, and this is the substance of *Islâm*, and the *substance* of any thing is not liable to be set aside: the consequences of *Islâm*, moreover, are *eternal happiness* and *future salvation*, and these being the greatest advantages and natural effects of *Islâm*, they are accordingly established;—and any injury to which he may be subject in consequence of his *Islâm* (such as incapacity to inherit, and so forth) is comparatively of little moment. The argument of *Abou Roosaf*, *Ziffer*, and *Shafëi*, in support of their opinion that no regard is to be paid to his apostacy, is that the apostacy is injurious to himself*. The argument of *Haneefa* and *Mohammed*, to prove that no regard is to be paid to his apostacy, is that the apostacy substantially exists, and what is *substantial* is not liable to be set aside, as was before urged in support of the opinion which asserts that regard is paid to his *Islâm*.—It is to be observed that the boy may be *compelled* to return to the faith after apostacy, as this is for his advantage; but he is not to be put to death on account of his apostacy, as that is *punishment*, and punishment is suspended with respect to infants, they being objects of mercy.—All that is here stated applies to boys under age, but *arrived at years of discretion*.—As to a boy who has not yet attained discretion, no regard is had to his apostacy according to all the doctors, because the declaration of such does not amount to a *change of faith*. The same rule applies to lunatics:—and a person intoxicated with liquor so as to be deprived of his reason is accounted the same as a lunatic.

but not other-
wife.

* A person under age is not held in law to be capable of any act by which he may injure himself, such as contracting debt, emancipating slaves, and the like; and the same rule is by those doctors applied to the circumstance of such a person's *apostacy*.

CHAP. X.

Of the Laws concerning *Rebels*.

PERSONS who resist the *Imám's* authority are of four descriptions.—
 I. Those who live in a state of disobedience to the *Imám* without assigning any reason, whether in open force or otherwise; and who rob and murder *Mussulmans*, and put travellers in fear;—and these are termed *Katta-al-Tareek*, or *highway robbers*, the laws respecting whom have been already treated of.—II. Those who are *not* engaged in open force, and who rob and murder *Mussulmans*, and put travellers in fear; but who proceed upon some avowed pretext; and these are also subject to the same law with *highway robbers*.—III. Those who being in a large body, and possessed of a power of open resistance, withdraw themselves from their obedience to the *Imám*, under an apprehension which leads them to suppose that he conducts himself improperly, and which impropriety of conduct is in their conception a sufficient cause of war, whether it be tyranny, or infidelity: and these are termed *Kbárijees*, or *insurgents*; and they hold the destroying of *Mussulmans*, the seizing of their property, and enslaving their women, to be lawful, and accuse the companions of the prophet of infidelity: the laws therefore respecting such, according to all the learned, and all the traditionists, are the same as the laws concerning REBELS.—IV. *Mussulmans* who withdraw themselves from their obedience to the *Imám*, and who hold it lawful to destroy *Mussulmans*, and to seize their property, and enslave their women, in the same manner as insurgents. People of this fourth description are termed *Bagbát*, [rebels:] *Bagbát* is the plural of *Bágbee*: the word *Bágbee*, in its literal sense, means prevarication; also injustice and tyranny:—

Rebels are of
four descriptions.

Definition of
the term
rightful Imám.

in the language of the LAW it is particularly applied to *injustice*, namely, withdrawing from obedience to the *rightful Imám*, (as appears in the *Fattahal-Kadêr*.)—By the *rightful Imám* is understood a person in whom all the qualities essential to magistracy are united, such as *Islamism*, freedom, sanity of intellect, and maturity of age,—and who has been elected into his office by any tribe of *Mussulmans*, with their general consent;—whose view and intention is the advancement of the true religion, and the strengthening of the *Mussulmans*,—and under whom the *Mussulmans* enjoy security in person and property;—one who levies *tithe* and *tribute* according to law;—who, out of the public treasury, pays what is due to learned men, preachers, *Kâzees*, *Moofitis*, philosophers, public teachers, and so forth;—and who is just in all his dealings with *Mussulmans*: for whoever does not answer this description is not the *right Imám*, whence it is not incumbent to support such a one, but rather it is incumbent to oppose him, and make war upon him, until such time as he either adopt a proper mode of conduct, or be slain; as is written in the *Mâdin-al-hikkâyek*, copied from the *Fawâyed*.

The *Imám*
must first en-
deavour to
reconcile re-
bels;

It is incumbent upon the *Imám* to recal rebels to their allegiance, and shew them what is right, in such a manner that the misunderstanding which occasioned their defection may be removed;—because *Alee* thus conducted himself with respect to the people of *Hirroo* (a district in the territory of *Koofa*,) when they rebelled;—and also, because this mode of proceeding is easier than *force*, and it is possible that this more easy mode of proceeding may succeed in removing the evil, so as to afford no occasion for more violent measures:—it is therefore requisite that they be recalled to their allegiance to the *Imám*, and shewn what is right.

but must not
refrain from
using force,
if necessary.

THE *Imám* must not, however, neglect more forcible measures, but in the beginning of an insurrection may oppose rebels by force of arms, sufficient to quell them. Our author remarks that *Kadbooree*

has

has thus asserted in his compendium: and *Imám Khábir Zâda* says that our doctors hold it to be lawful for the *Imám* to begin by making war upon them, where they are levying troops and collecting themselves together. *Shafeï* maintains that it is not lawful to make war upon rebels, until they commit acts of hostility, because it is not lawful to kill *Mussulmans* but for the purpose of repulsion, and *rebels* are *Mussulmans*:—contrary to the case of *infidels*, the commencing war with whom is lawful, as their infidelity (according to *Shafeï*) legalizes the putting them to death. The reasoning of our doctors is that the propriety of commencing war upon rebels rests upon a circumstance which argues that *they* will commit hostilities on *their* part; and their levying troops, and collecting themselves together, and withdrawing themselves from their obedience to the *Imám*, are all circumstances which argue an hostile intention; for if the *Imám* were to wait until they had actually commenced hostilities, it is likely that he might afterwards find the repulsion of them impracticable; it is therefore highly requisite that he commence hostilities against them, under any of the above circumstances, in order that their wickedness may be repelled.

UPON the *Imám* being informed of rebels purchasing arms and instruments of war and preparing for hostilities, he must instantly seize and imprison them, until they turn from their rebellion, and repent, in order that their wickedness may be (as far as is possible) repelled.

The *Imám* must imprison malcontents on the first appearance of an insurrection.

IF the rebels have a body of forces to which those who fly from battle may join themselves, in this case it is necessary, without loss of time, to put to death all the wounded, and to pursue those who fly, in order that they may not join that body, and that their wickedness may be repelled: but if the rebels have not a body of this kind in reserve, their wounded must not be slain, nor those of them pursued who fly from battle, as in this case their wickedness is repelled with-

Rule of conduct towards rebels where they have a force in reserve.

out further bloodshed.—*Shafei* says that in neither case are their wounded to be slain, or those of them who fly from battle pursued, because the slaying of them is not lawful but for the purpose of *repulsion*, and upon a rebel being disabled; or flying from battle, the slaying of him is no longer *for the purpose of repulsion*, and consequently is illegal. To this, however, it may be replied that the slaying of them turns upon the *argument* of hostility, not upon *actual* hostility, (as was before stated,) and where they possess a reserved force to which the wounded or the fugitives may join themselves, this argument of hostility exists.

The families and property of rebels remain inviolate.

THE families of rebels are not to be reduced to slavery, nor their property divided among the *Mussulmans*, [in the manner of *plunder*.] The reasons for this are twofold:—FIRST, *Alee*, in the war of *Jaml*, ordered that “the slaves of the rebels should not be slain, nor their “wives or families enslaved, nor their property taken,” and he is legislator in this particular; (the exposition of that passage, in the orders of *Alee*, that “*the slaves should not be slain*, is, that they are not to be slain, *where there is no body of the rebels to which they might unite themselves, if suffered to go*;—for where there is such a body, it is at the discretion of the *Imám* either to kill the slaves, or to imprison them, so as to prevent their joining this body:)—SECONDLY, rebels are *Mussulmans*, and *Islamism* occasions protection to person and property.

The arms of rebels may be turned against themselves.

THE *Mussulmans* need not hesitate to fight rebels with such of their arms as fall into their hands, provided they have occasion for them. *Shafei* maintains that this is unlawful: and the same difference of opinion subsists respecting such *horfes* of the rebels as fall into the hands of the *Mussulmans*. The argument of *Shafei* is that as these are the property of *Mussulmans*, the use of them, unless with consent of the owner, is illegal. The arguments of our doctors upon this point are *twofold*,—FIRST, *Alee* divided the arms of the rebels among his followers

lowers in *Basra*, and this division was made on account of *necessity*, and not as a transfer of property:—SECONDLY, as it is lawful for the *Imám* to take the arms of *others* who are not rebels, and to divide them among the troops, to use according to necessity, it follows that the same act with respect to the property of *rebels* is lawful in the *Imám a fortiori*, on this ground, that it is lawful to adopt a *small* evil, for the purpose of repelling a *great* one. It is incumbent on the *Imám*, moreover, to detain the property of rebels in custody; and he must neither share it as spoil, nor restore it to the owners until they repent; but upon their repentance, he may restore to them their property: their property is not to be shared as spoil, because *rebels* are *Mussulmans*, and *Islamism* occasions protection to person and property, as was before stated;—but it is to be detained in custody, as their wickedness may be repelled by cutting off their resources; their property, therefore, is to be held in custody although the *Mussulmans* have no occasion for it: (such horses, however, as are among their property, must be sold, because keeping the *price* is both easy, and also advantageous to the owner:)—and their property must be restored to them upon repentance, because the reason of detention ceases upon repentance, and the property is not *spoil*.

The property of rebels must be held in custody,

and restored to them upon their repentance.

If the rebels should have exacted *tithe* or *tribute* of the inhabitants of a territory which they had overcome, the *Imám* must not again levy *tithe* or *tribute* there, because the *Imám* is vested with authority to collect those taxes of the people, *in virtue of the protection he affords them*; and in the case in question he has not protected them. If, then, the rebels expend the *tithe* and *tribute* upon their proper objects, it suffices with respect to the people of whom those taxes had been collected by them, and the *tithe* and *tribute* owing by them is duly rendered, as the claimant to them has received his right:—if, however, the rebels have *not* expended the *tithe* or *tribute* upon their proper objects, the people of that district are bound in conscience to pay them over again, because what they first gave has not been applied to the

Tithe or *tribute*, if exacted by rebels, cannot be levied a second time:

but upon the recovery of the territory, they continue to be collected as before.

proper object. Our author remarks it as an opinion of the learned in the law, that it is *not* incumbent upon the people to pay *tribute* over again, because the rebels are also *warriors, who make war upon infidels**, and are therefore proper objects of expenditure of tribute, although they be *rebels*; and in the same manner, it is not incumbent upon them to pay *tithe* a second time, where the rebels are in a state of poverty, since *tithe* is a right of the *poor*:—but *for the future* the *Imám* will collect *tithe* and *tribute* from those people, because he then protects them, and consequently his authority over them is evident.

One rebel killing another does not incur any fine.

IF, in an army of rebels, one of them kill another, and the rebels be afterwards overcome by the troops of the rightful *Imám*, no fine of blood is exacted of the slayer; nor is he subject to retaliation; because the authority of the rightful *Imám* did not extend over him at the time of the murder, and hence the act does not occasion either retaliation or fine;—in the same manner as a murder committed in a foreign country; that is, if one *Mussulman* kill another in a foreign country, and the *Mussulman* forces afterwards overcome that territory, the murderer is not liable to any punishment;—and so also in the case in question;—because the *reason* (namely, non-existence of the *Imám*'s authority at the time of the fact,) appears in both cases alike.

Murder, committed in a city possessed by rebels, but where they have not established any jurisdiction, upon recovery of the city occasions retaliation.

IF rebels overcome a city, and one of the inhabitants wilfully murder another, and the troops of the rightful *Imám* afterwards recover the city and drive the rebels away, before they have been able to establish any jurisdiction over the inhabitants, in this case retaliation must be executed upon the murderer, because in such an instance the authority of the *Imám* has never been completely terminated there:—retaliation is therefore due.

* As being *Mussulmans*, and consequently subject to the divine injunction in this particular.

IF a person, not a *rebel*, slay a rebel, the murderer nevertheless inherits of the rebel*, where connexion of inheritance subsists between the parties (such as *father* and *son* for instance.)—If, moreover, one *rebel* kill another, and declare that “he had slain him *in the right* †,” and persist in this declaration, in this case also the slayer inherits of the slain: but if the slayer aver that “he had killed him *unrightfully*,” in this case he cannot inherit of him. This is the doctrine of *Haneefa* and *Mohammed*. *Abou Yoosuf* maintains that the slayer cannot inherit of the slain in either case, and such is also the opinion of *Shafei*. This difference of opinion has its foundation in the rule of our doctors, that where any person, not a *rebel*, destroys either the person or the property of a rebel, nothing whatever is incumbent upon him, neither *fine*, *retaliation*, nor indemnification for the property,—nor is he an *offender*, because every person not rebellious is commanded to make war upon rebels, for the purpose of repelling their wickedness;—and in the same manner a *rebel*, if he kill one who is not a rebel, is not liable either to *fine* or *retaliation*:—but yet he is an *offender*.—According to *Shafei*, on the other hand, (in conformity with an opinion of his before delivered,) the rebel is liable to *fine*, *retaliation*, or *indemnification* for the property:—and the same difference of opinion obtains in a case where an apostate dies, or deserts to a foreign country, after having destroyed the person or property of any one. The argument of *Shafei* is that the rebel in question has destroyed protected property, or has slain a person of protected blood, and is consequently answerable, in the same manner as is the rule with respect to an apostate who is guilty of a destruction of person or property before he has become independent of the *Mussulman* government ‡ by uniting him-

A loyal person killing a rebel may yet inherit of him: and, in the same manner, a rebel may inherit of a loyal person, if he justify the act.

* By the law of inheritance, a murderer is incapacitated from inheriting of the person whom he has murdered, whatever be their relative connexion.

† That is, in the cause of the rightful *Imam*, as being a *rebel*.

‡ Literally, *before he has acquired a power of open resistance*, for upon this *power of open resistance* being (by whatever means) acquired, a person is no longer considered as being *subject to the law*.

self to a foreign power. The arguments of our doctors upon this point are twofold:—FIRST, what they maintain is the united opinion of all the companions, as recorded by *Zābree*:—SECONDLY, the rebel in question has committed the destruction under an invalid pretext; and an *invalid* pretext stands the same as a *valid* pretext, in respect to the obligation of responsibility, where, together with the invalid pretext, there is also a power of open resistance;—in the same manner as where an alien kills a *Mussulman* in a foreign country, in which case the alien, if he afterwards become a *Mussulman*, is not responsible for the murder; because (at the time of the murder) he possessed a power of open resistance*, and also a pretext.—The principle upon which this proceeds is that in order to the law taking effect upon a person against whom any thing lies, it is requisite that he either acknowledge the law, or that there exist a power of enforcing the law upon him at the time of the fact:—now a *rebel* does not acknowledge the illegality of slaying one who is *not* a rebel, since in his belief (in conformity with his *invalid pretext*,) the slaying of such a person is allowable;—neither is there a power of enforcing the law upon a rebel, since the *Imām's* authority is terminated with respect to a rebel, in consequence of the rebel being possessed of a power of open resistance.—The case is otherwise *previous* to the establishment of the power of open resistance, as the *Imām's* authority is then not extinguished.—It is also otherwise where he slays *without* a pretext, as in this case an obligation of responsibility rests upon him according to his own belief.—It is contrary, also, to *criminality*, as a rebel is an *offender* in slaying a person who is *not* a rebel, although he be possessed of a power of open resistance; for the possession of this power does not prevent a circumstance being *sinful*, since the sinfulness of an act is on account of the right of the LAW, and his possession of the power of open resistance is not established with respect to the LAW.—This point, therefore, being established, it is to be observed

* That is, was altogether independent of the *Mussulman* government.

that the slaying of a rebel by one who is *not* a rebel is not an *unrightful* act, (the rebel being slain by him *in the right*,) and therefore neither prevents inheritance nor occasions responsibility.—The argument of *Abou Yoosaf*, (in the case of a rebel killing a loyalist) is that an invalid pretext has no regard paid to it further than merely to prevent responsibility; responsibility therefore is not incumbent: but yet the slayer does not inherit, because his being the heir depends upon the previous establishment of his right of inheritance; and an invalid pretext is of no consideration to establish a right of inheritance; wherefore he does not inherit of the slain. The argument of *Haneefa* and *Mohammed* upon the point in question is that the sole reason why one relation inherits of another relation is because relationship occasions the establishment of a right of inheritance;—and relationship exists in the case here supposed: now inheritance is rendered illegal only by the act of killing, which being supervenient, there is a necessity to abrogate the supervenient illegality; and an invalid pretext is sufficient for this purpose, in the same manner as it suffices to abrogate the obligation to responsibility: the invalid pretext, therefore, is regarded for the purpose of doing away the illegality:—one condition of it, however, is that the murderer continue steady in his invalid pretext, and in his belief;—for if he were to say, “I now am sensible that I slew him *unrightfully*,”—in this case he would be responsible for the act, as the pretext aforesaid, which had prevented responsibility, no longer exists.

THE sale of armour or warlike stores to rebels, or in their camp, is abominable, because selling arms into the hands of a rebel is an assistance to defection. There is, however, nothing objectionable in the selling of arms in a city (such as *Koofa*, for instance,) either to an inhabitant, or to a person of whom it is not known whether he be a rebel, although he should actually belong to the rebels, because the bulk of people in cities are commonly of loyal principles.—It is to be observed, also, that it is not criminal to sell to rebels any thing except

Arms or armour must not be sold to rebels:

but materials to make arms may be sold to them.

except what may be strictly termed *tarms*, inasmuch that materials to construct arms, (such as *iron*, and so forth,) may be sold to them without offence;—in the same manner as it is illegal to sell musical instruments (such as *lutes*, for instance,) but it is not illegal to sell the wood of which they are made;—and analogous to this is also the sale of grapes, or *wine*,—that is to say, the selling of grapes to a person who will make wine of those grapes is not illegal, although the sale of *wine* be prohibited.

HEDAYA.

H E D A Y A.

B O O K X.

Of the *Laws* respecting *Lakeets*, or *Foundlings*.

LAKEET, in its primitive sense, signifies any thing lifted from the ground:—the term is chiefly used to denote an infant abandoned by some person in the highway:—in the language of the LAW it signifies a child abandoned by those to whom it properly belongs, from a fear of poverty, or in order to avoid detection in whoredom.—The child is termed *Lakeet*, for this reason, that it is eventually *lifted from the ground*, wherefore this term is *figuratively* applied, even to the *property* which may happen to be found upon it. The person who takes up the foundling is termed the *Mooltakit*, or *taker-up*.

Definition of
Lakeet.

THE taking up of a foundling is laudable and generous, as it may tend to preserve his life. This is where the finder sees no immediate reason to suppose that if the child be not taken up it may perish:—

The taking
up of a found-
ling is laud-
able, and (in
some cases)
incumbent.

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but

but where he sees reason to apprehend that it may otherwise perish, the taking of it up is *incumbent*.

A foundling is free;

A FOUNDLING is free; because *freedom* is a quality originally inherent in MAN; and the *Mussulman* territory, in which the infant is found, is a territory of *freemen*, whence it is also free: moreover, *freemen*, in a *Mussulman* territory, abound more than *slaves*, whence the foundling is free, as the *smaller* number is a dependant of the *greater*.

and is maintained by the state.

THE maintenance of a foundling is to be defrayed from the public treasury; because it is so recorded from *Omar*;—and also, because, where the foundling dies without heirs, his estate goes to the public treasury; and as that is the property of the *Mussulman* community, his maintenance must be furnished from this property, since as the advantage results to the community, the loss also falls upon the community;—whence it is that the *Deyit* or fine of blood is due from the public treasury, where a foundling commits manslaughter.

A foundling owes nothing to his *Mooltakit* for subsistence unless he furnish it by order of the magistrate.

THE *Mooltakit* is not to exact any return from the foundling on account of his maintenance, since in maintaining him he acts gratuitously, as he has no authority over him:—he therefore cannot exact any return from the foundling,—except where he has furnished him maintenance by order of the magistrate, in which case this maintenance is a debt upon the foundling, because, the magistrate's authority being *absolute*, he is empowered to exact the return from the foundling.

No person can take a foundling from his *Mooltakit* but by virtue of a claim of parentage.

IF any person take up a foundling, no other person is at liberty to take the foundling from him, because the right of charge of the foundling is established in him, as he first laid hands upon it.—If, however, any person *claim* the foundling, saying “This is my child,” the claimants declaration is credited on a principle of benevolence. This is where the *Mooltakit* does not advance any *claim of parentage*: but if the *Mooltakit* also make a claim, saying “This is my child,” he

he has the preference, because both parties are upon an equal footing with respect to their claim; but one of them, namely, the *Mooltakit*, is in immediate possession, and is therefore preferred to the other. Analogy would require that the declaration of the claimant be not credited, because in consequence of it the right of the *Mooltakit* is destroyed: but the reason for a more favourable construction of the law in this particular is that the claim of the plaintiff is a declaration upon a point which is advantageous to the infant, as he thereby obtains the honour of an avowed parentage, and the disgrace of a want of parentage is by the claim removed from him. Some have asserted that the declaration in question is valid only with respect to the establishment of parentage, but not with respect to the destruction of the *Mooltakit*'s right of possession;—and some, again, say that upon the parentage being established, the *Mooltakit*'s right of possession is destroyed, because one consequence of an establishment of parentage is that the father has a preference, in the charge of his child, over all others.

If a *Mooltakit* declare his foundling to be *his own child*, after having already declared it to be *a foundling*, some say that his declaration is valid, both from analogy, and also on a principle of benevolence, because his claim respects a thing already in his hands, and is uncontroverted,—nor is any other person's right thereby destroyed. The better opinion, however, is that his claim is valid only on a *principle of benevolence*, and not from *analogy*, because the *Mooltakit* contradicts himself, as he at first declared the child to be a foundling, and afterwards avers it to be *his own child*;—and the reason for a more favourable construction is that the contradiction respects a thing of a concealed nature, since it is possible that this child may have been born of his wife, without his knowledge, and that he afterwards comes to a knowledge of the circumstance.

A Mooltakit's claim of parentage with respect to his foundling is admitted.

If two persons advance a claim together, each asserting—"the foundling in the hands of such a person is my child," and one of

Case of a claim of parentage made

by two persons.

them point out a particular *mark* upon the foundling's body, and not the other, the foundling is adjudged to him, because apparent circumstances bear testimony in his favour, as the mark corresponds with his declaration. But if neither of them point out any particular mark, the foundling is adjudged to both of them, because they are both upon a footing with respect to the ground of their claim. If one of them, however, lay his claim first [that is, before the other,] the foundling is adjudged to him, because his right is established at a time when no person controverted it;—except where the other brings evidence, as evidence is more powerful than a simple *claim*.

A foundling discovered by a *Zimnee* in a *Mussulman* territory is a *Mussulman*;

If a foundling be taken up in a *Mussulman* city or village, and a *Zimnee* claim it as *his child*, the parentage is established in the *Zimnee*, but the child is a *Mussulman*. This proceeds upon a favourable construction; because the claim of the *Zimnee* involves two points, I. a declaration of parentage, which is *advantageous* to the child, —II. a destruction of the *Islamism* established from the circumstance of the child being found in a *Mussulman* territory, which is *injurious* to the child; and his claim is admitted so far as it is advantageous to the child, but not so far as to be injurious to him. If, however, the child be found in a city or village of the *Zimnees*, or in a *church* or *synagogue*, it is a *Zimnee*. This last opinion is universal, (that is to say, is unanimously admitted) where the foundling is taken up, in those places, by a *Zimnee*:—but if a foundling be taken up in any of those places by a *Mussulman*, or if a *Zimnee* take up a foundling in any *Mussulman* place, there is a difference of opinion; for it is said in the *Mabsoot*, treating of foundlings, that in this case the *place* is regarded, and not the *Mooltakit* or taker-up of the foundling;—that is, if it be found in a *Mussulman* place, the foundling is a *Mussulman*, and if not, it is a *Zimnee*, whether it be taken up by a *Mussulman* or an *infidel*: and the reason is this, that the foundling has been first discovered in that place. In some copies of the book of claims from the *Mabsoot* it is said that in this case regard is had to the *Mooltakit*;

and if in a *Zimnee* territory, he is a *Zimnee*.

Mooltakit;—that is, if a *Mussulman* have taken up the foundling, it is a *Mussulman*, and if a *Zimnee* have taken it up it is a *Zimnee*:—(and the same is mentioned by *Ibn Simâia* from *Mohammed*:) and the reason is this, that *possession* is more powerful than *place*; because, if parents were brought as captives, with their infant child from a foreign country into the *Mussulman* territory, the infant is an infidel in conformity with the state of the parents, from which it is evident that *possession* is more powerful than *place*. In other copies of the book of claims it is said that, out of tenderness to the child, regard must be invariably had to *Islâm*;—in other words, if the child be found in a place belonging to *Zimnees*, and be there taken up by a *Mussulman*, it is a *Mussulman*; and if it be taken up by a *Zimnee* in a *Mussulman* place, it is in this case also a *Mussulman*.

If any person lay claim to a foundling, as being *his slave*, his claim is not admitted, because as it is apparent that the foundling is *free*, it cannot be supposed a slave unless the claimant produce evidence to prove that it belongs to him *as such*. Observe, also, that if a *slave* were to claim a foundling, saying “this is my child,” the parentage is established in him, because this is advantageous: the foundling, however, is *free*, because the child of a man who is a slave is free when born of a *free* woman, and it is a slave when born of a woman who is a *slave*; concerning the child being a slave, therefore, there is a doubt; and hence its *freedom*, which is shewn by apparent circumstances, cannot be destroyed, because of the doubt. A freeman, in claiming a foundling, has preference to a slave, and a *Mussulman* has preference to a *Zimnee*, because the claim of a *freeman* or of a *Mussulman* is most advantageous to the infant.

A foundling cannot be claimed as a *slave*.

A slave's claim of parentage with respect to a foundling is admitted; but the foundling is *free*.

If there be any property upon a foundling (such as *bracelets* and so forth,) such property belongs to the foundling, because apparent circumstances argue this: and in the same manner, and for the same reason, if there be any property fastened on the animal upon which a foundling

The property discovered upon a foundling is *his*; and may be applied to his

use upon the
authority of
the *Kázee*.

foundling is exposed, such property also belongs to the foundling. The *Mooltakit* moreover must expend this property in supplying the wants of his foundling, upon an order from the *Kázee*, because no person is known as proprietor of it, and the *Kázee* has authority to expend property of this nature upon such an object. Some say that the *Mooltakit* is at liberty to expend the property in supplying the wants of his foundling, *without* any order from the *Kázee*, because it appears that the property in question belongs to the foundling; and a *Mooltakit* is authorised to provide subsistence for his foundling, and to purchase such articles as are requisite and necessary for him, such as *viñtuals* and *clothing*.

A *Mooltakit*
cannot con-
tract his
foundling in
marriage:
nor perform
any acts in
respect to his
property
(without au-
thority:)

It is not lawful for a *Mooltakit* to contract his foundling in marriage, because he has no authority for so doing, since the reason for such authority, (namely, *relationship, proprietorship, or sovereignty,*) do not exist in him. In the same manner, it is not lawful for a *Mooltakit* to perform any acts respecting the property of his foundling; analogous to the restriction upon a *mother*;—that is, a mother has a right to the charge of her infant child, but yet is not at liberty to perform any acts respecting his property; and a *Mooltakit* stands in the same predicament. The principle upon which this proceeds is that authority to act with respect to the property of an infant is established with a view to the increase of that property; and this is assured only by two circumstances, *perfect discretion*, and *complete affection*: now in each of the persons in question only *one* of these qualities exists; for a mother, although she entertain a *complete affection* for her child, is deficient in point of *discretion*; and a *Mooltakit*, although he be possessed of *perfect discretion*, is deficient in *affection*.

but he may
take possession
of *gifts*;

IT is lawful for a *Mooltakit* to take possession of any thing presented to his foundling as a *gift*, because this is of singular advantage to the foundling: and for this reason it is that an infant is at liberty to take possession of a gift, where he has attained discretion; and in the

same manner the *mother* of an infant, or her *executor*, are at liberty to take possession of any gift presented to the infant.

A MOOLTAKIT is at liberty to send his foundling to school for the purpose of education, because this comes under the head of *tuition* and *instruction*, and attention to his welfare. and send him to school.

A MOOLTAKIT is at liberty to *hire out* his foundling.—Our author remarks that this is recorded by *Kadooree* in his compendium. In the *Jama Sagbeer* it is said that it is *not* lawful for a *Mooltakit* to hire out his foundling;—and this is approved. The ground upon which the report of *Kadooree* proceeds is that letting out to hire is one mode of instruction. The reason for the opposite doctrine, as stated in the *Jama Sagbeer*, is that a *Mooltakit* is not at liberty to turn the faculties of his foundling to his own advantage; he is therefore in the same situation as an *uncle*: contrary to the case of a *mother*, since she is at liberty to turn the faculties of her child to her own advantage, as shall be hereafter demonstrated in treating of *Abominations*. He cannot let him out to hire.

H E D A R A.

B O O K XI.

Of *Looktas*, or *Troves*.

Definition of
Lookta.

LOOKTA signifies property which a person finds lying upon the ground, and takes away for the purpose of preserving it, in the manner of a *trust*. It is proper to observe that the terms *Lakeet* and *Lookta* have an affinity with respect to their *sense*, the difference between them being merely this, that *Lakeet* is used with regard to the human species, and *Lookta* with regard to any thing else.

A *trove* property is as a *trust* in the hands of the finder;

A LOOKTA, or *Trove* property, is considered as a trust in the hands of the *Mooltakit* or finder, where he has called persons to witness that “ he takes such property in order to preserve it, and that “ he will restore it to the proprietor,”—because this mode of taking it is authorised by the LAW, and is even the *most eligible* conduct*,

* That is to say, the taking up of the property is *permitted* by the LAW, and is even *more eligible* than suffering it to remain where it is found.

according

according to many of our doctors. This is where there is no apprehension of the property being damaged or destroyed*:—but where that is to be apprehended, the taking of it up is *incumbent*, according to what the learned in the law have remarked upon this point. Now such being the case, the property is not a subject of responsibility; that is, indemnification for the trove property is not incumbent upon the finder, where it happens to perish in his hands: and in the same manner, the finder is not responsible in a case where himself and the proprietor both agree that he had taken the property avowedly “for the owner;” because their agreement in this point is a proof with respect to both; and hence the declaration of the proprietor that “he [the finder] “had taken them for the owner” amounts to the same as if the finder were to produce evidence that he had taken them for the owner.—If, however, the finder declare “I took them for *myself*,” responsibility is incumbent upon him according to all authorities, because he here appears to have taken the property of another without that other’s consent, and without the permission of the LAW.

who is not responsible for any damage it may sustain in his hands,

unless he avow that he took the property with a view to convert it to his own use.

If the finder should *not* have called any person to witness, at the time of his taking the property, that “he took it for the owner,” and he and the owner afterwards differ upon this point, the finder saying “I took it *for the owner*,”—and the owner denying this,—indemnification is due, according to *Haneefa* and *Mohammed*. *Abou Yoofof* says that indemnification is not due, and that the *finder’s* declaration is to be credited, as appearances testify in his behalf, because it is probable that his intention was *virtuous*, and not *criminal*. The argument of *Haneefa* and *Mohammed* is that the finder has already acknowledged the fact which occasions responsibility, (namely, his taking the property of another,) and afterwards pleads a circumstance in consequence of which he is discharged from responsibility, by de-

The finder is responsible for the trove, if he have not witnesses to testify that he took it for the owner.

* Meaning—“in case of its not being taken up.”

claring that he had taken the property for *the owner*; but as this is a *doubtful* plea, he is not discharged from responsibility: and with respect to what is urged by *Abou Yoozaf*, that “appearances testify in “the finder’s behalf,” they reply that in the same manner as appearances argue that the finder took the property for the *owner*, so do they likewise argue that he has taken them for *himself*, as it is probable that a person who performs acts with respect to property does so for *himself*, and not for *another*; and hence, as appearances on both sides lead to opposite conclusions, they are on both sides dropt.

The trove is sufficiently witnessed by the finder’s notification of it to the bystanders.

IN calling people to witness it suffices that the finder say to the bystanders “If ye hear of any one seeking for this *trove*-property, “direct him to me;”—and this, whether the trove property consist of a single article, or of numerous articles, because, as the term *Lookta* is a *generick* noun, it applies either to a single article, or to several different articles.

A trove under ten *dirms* must be advertised for some days, and one above ten *dirms*, for a year.

IF the trove property be of less value than ten *dirms*, it behoves the finder to advertise it for some days,—(that is, for so long as he deems expedient,)—but if it exceed ten *dirms* in value, he must advertise it for the space of a year. The compile. of the *Hedäya* remarks that this is one opinion from *Haneefa*. *Mohammed*, in the *Mabsoot*, maintains that the finder should advertise it for the space of a year, whether the value be *great* or *small*, (and such is also the opinion of *Shafëi*,) as the prophet has said “*the person who takes up a “trove property must advertise it for a year*,”—without making any distinction between a *small* property and a *great* property. The reason for the former opinion is that the fixing it at the space of a year occurred respecting a trove property of the value of one hundred *deenars*, which are equal to a thousand *dirms*; now ten *dirms*, or any thing above that sum, are the same as a thousand *dirms* with respect to the amputation of a thief’s hand, or the legalizing of generation*.

* Ten *dirms* is the smallest dower admitted in marriage.

whence

whence it is enjoined to advertise a trove property for *a year*, out of caution; but any thing *short* of ten *dirms* does not resemble a thousand *dirms* with respect to any of those particulars, whence this point is left to the discretion of the finder of a property of that value. Some allege that the approved opinion is that there is no particular space of time, this being left entirely to the discretion of the finder, who must advertise the trove property until he see reason to conclude that it will never be called for by the owner, and must then bestow it in alms. All that is here advanced proceeds upon a supposition that the trove property is of a lasting and unperishable nature: but if it be of a perishable nature, and unfit to keep, it must be advertised until it is in danger of perishing, and must then be bestowed in alms. It is proper to remark that the finder must make advertisement of the trove property in the place where he found it, and also in other places of public resort, as by advertising it in such places it is most probable that the owner may recover it.

If the trove property be of such a nature as that it is known that the owner will not call for it, (such as date-stones, or pomgranate skins) it is the same as if the owner had thrown it away, insomuch that it is lawful to use it without advertisement: but yet it still continues the property of the owner*, as transfer to a person unknown is not valid.

A trove of an *insignificant* nature may be converted by the finder to his own use.

If the finder duly advertise the trove property, and discover the proprietor, it is well:—but if he cannot discover him, he has two things at his option;—if he chuse, he may bestow it in alms, because it is incumbent to restore the property to the owner as far as may be possible, and this is to be effected either by giving the actual property

If the owner do not in due time appear, the finder may either bestow the property in alms, or keep it for the owner.

* That is to say, although it be lawful for the finder to use it, yet the owner has a claim upon him for the value.

to the owner, where he is discovered, or by bestowing it in alms, so as that a return for it, (namely, the *merit*) may reach the owner, as he will assent, upon hearing of its having been so bestowed: or if the finder chuse, he may continue to keep the property, in hopes of discovering the owner and restoring it to him.

Where the
trove has been
bestowed in
alms, the
owner may
either ratify
the alms-gift,

If the finder of a trove property discover the owner, after having bestowed it in alms, the owner has two things at his option:—if he chuse, he may approve of and confirm the charity, in which case he has the *merit* of it; because, although the finder has bestowed it in alms by permission of the LAW, yet as the owner has not consented to his so doing, the *alms-gift* remains suspended upon his consent to it: as the *pauper*, however, becomes endowed with the property in question *previous* to his consent, it does not remain suspended upon the continuance of the subject*: (contrary to a case of sale by an unauthorised person; in other words, if an unauthorised person execute a sale, the validity of it depends upon the continuance of the subject†, that is, of the article sold, because the purchaser does not become endowed with it until *after* consent:) or, if the owner chuse, he may take an indemnification from the finder, because he has bestowed a property upon the poor without consent of the proprietor.

or take in-
demnification
from the
finder,

OBJECTION. It would appear that indemnification is not incumbent upon the finder, as he has bestowed the property in alms, with the consent of the LAW.

REPLY.—His bestowing it in alms, with the consent of the LAW, does not oppose the obligation of responsibility, in behalf of the right of the owner; in the same manner as where a person eats the property of another when perishing with famine; for in this case he owes in-

* “*Upon the continuance of the subject.*” That is, upon the continuance of the property in the hands of either the donor or the proprietor.

† That is, upon the continuance of the property, which is the subject of the sale, in the hands of the owner.

demnification, although he be permitted by the LAW to eat another's property in such a situation; and so also in the case in question.

—Or, if the owner chuse, he may take indemnification from the *pauper*, where the trove property has perished in his hands,—because he has taken possession of the property of another person without his consent;—or, if the property be remaining in the hands of the pauper, the owner may take it from him, as he thus recovers his *actual property*.

or from the pauper upon whom it has been so bestowed :

or, if still existing, may claim restitution of it.

OBJECTION.—It has been already stated that the pauper becomes endowed with the property *previous* to the owner's consent; whence it would appear that the owner has no right to restitution.

REPLY.—Establishment of property does not oppose a right to restitution; in the same manner as a donor is at liberty to resume his gift, although the donee have become proprietor upon taking possession of it.

It is laudable to secure and take care of strayed cattle; such as *oxen*, *goats*, or *camels*. *Malik* and *Sbafēi* maintain that where a person finds strayed camels or oxen in the desert*, it is most eligible to leave them, the seizing of them being abominable:—and concerning the securing of strayed *horses* there is the same difference of opinion. The argument of *Malik* and *Sbafēi* is that *illegality* is *originally* connected with taking the property of another, which is not allowable except where there is apprehension of its perishing if it be not taken: but where a trove property is of such a nature as to be capable of repelling beasts of prey, (such as *oxen*, who may repel them with their horns, or *camels* and *horses*, who may repel them with their hoofs or their teeth,) there is little apprehension of its perishing: it is still however to be suspected that it *will* perish, and hence it is declared abo-

Stray animals ought to be secured and taken care of for the owner.

* *Arab. Sibra*. This is the term applied in general to the extensive and barren deserts of *Arabia*; it also means any waste or unenclosed land.

but he is not responsible to the finder for the subsistence, unless it be furnished by order of the magistrate;

who, if they be fit for hire, must direct them to be hired out for that purpose,

or, if unfit, to be sold, and the price retained for the owner;

unless he think fit to order them a subsistence, which is in that case a

minable to secure it, and most laudable to leave it*. The argument of our doctors is that the animals in question are *trove property*, and there is reason to apprehend their perishing, whence it is laudable to secure and advertise them, in order that the property may be preserved, in the same manner as the securing of strayed *goats* is laudable according to all. If, moreover, the finder give subsistence to troves of this description without authority from the magistrate, it is a gratuitous act, because of his not possessing any authority: but if he give subsistence by order of the magistrate, it is a debt upon the owner, because the magistrate is endowed with authority over the property of an absentee, for the purpose of enabling him to act with kindness† to the absentee; and the giving of subsistence is a kindness on some occasions, as shall be demonstrated elsewhere. If the question respecting the subsistence of the troves be brought before the magistrate, he must inquire into the particulars; and if the troves be capable of *hire*, (such as *horses*, *camels*, or *oxen*) he must order them to be hired out, and subsisted from their hire, because in this case the animals continue the property of the owner without subjecting him to any debt: (and a similar judgment must be passed with respect to fugitive slaves:)—but if the troves be unfit for *hire*, (such as *goats* or *sheep*,) and it be apprehended that, if the finder were to subsist them, the subsistence would equal their value, the magistrate must direct them to be sold, and the price to be kept, in such a manner that the troves may be *virtually* preserved, in their *value*, because the preservation of them in *substance* is impracticable.—If, however, the magistrate deem it fit to give subsistence, he must adjudge subsistence to be given, making the same a debt upon the owner of the animals,—because the magistrate is appointed for the purpose of exercising huma-

* This is strange reasoning: it may perhaps have some reference to *predestination*; i. e. as these animals seem DESTINED to perish, it is impious to attempt to prevent this destiny.

† By the term *kindness* is here and elsewhere meant a due attention to the interest of the party concerned.

nity and kindness; and the giving of subsistence is a kindness both to the *owner* and to the *finder*;—to the *owner*, because his property is thus preserved to him in substance; and to the *finder*, because the subsistence he furnishes is thus made a debt upon the owner. The learned in the law, however, have said that the magistrate is to issue the order for subsistence only for the term of two or three days, in hopes that the owner may appear; and that if the owner do not appear, he must then order the troves to be sold, because to afford subsistence to them for a continuance would be to eradicate the property, whence there would be no kindness in affording them subsistence for a long term (that is, for a term *beyond* three days.)—It is observed, in the *Mahfoot*, that the production of evidence is requisite,—that is, the magistrate is not to give an order for subsisting the animal, except where the finder produces evidence to prove that “such an animal is a trove;” and this is approved, because it is possible that he may have obtained possession of the animal by *usurpation*, and in a case of *usurpation* the magistrate does not give an order for subsistence, but directs the thing usurped to be restored to the owner, except in a case of *deposit*, which cannot be proved without evidence; the production of evidence, therefore, is essentially requisite, in order that the actual state of the case may be ascertained.

OBJECTION.—Evidence is not admissible without an adversary; and in the case in question there is no adversary;—how, therefore, can evidence be admitted?

REPLY.—The evidence, in the present case, is not required for the purpose of a *judicial decree*, so as to make the existence of an adversary a necessary condition.

—If the finder say “I have no evidence of the animal being “with me as a trove,” still as it is apparent that it *is* a trove, the magistrate must say “subsist this animal *provided your declaration be true!*” and then, if the finder’s declaration be true, he will have a claim upon the owner for the subsistence, but not if he be an *usurper*. It is here necessary to remark that what is advanced above, that “the magistrate must adjudge subsistence to be

debt upon the owner:

but subsistence must not be ordered for more than a few days

nor unless the finder produce evidence in proof of the trove.

If the finder have no evidence, the order for subsistence must be conditioned upon the veracity of his declaration.

The finder has no claim upon the owner for the subsistence, unless the magistrate expressly declare, in his order, that the owner is responsible for the same :

“ given, making the same a debt upon the owner of the animals,” plainly implies that the finder will have no claim upon the owner for such subsistence, upon his appearing at a time when the trove has not yet been sold, unless the magistrate, in his decree, direct that “ he “ shall have such a claim upon him ;”—but if the magistrate should not thus have rendered the subsistence a debt upon the owner, the finder would have no claim upon him for it:—this is approved doctrine. Some say that the finder has a claim upon the owner for the subsistence, where he furnishes it by order of the magistrate, whether the magistrate may have explicitly declared the same to be a debt upon the owner or not.

but he may detain the trove from the owner until he be paid for the subsistence :

UPON the owner appearing, the finder is at liberty to detain the trove, until he pay him for the subsistence; because the finder has preserved the trove, and kept it alive, by subsisting it. The case is therefore the same as if the owner had obtained his *right of property* through the finder; and consequently the trove resembles an article of sale; that is, in the same manner as the seller is entitled to detain the article sold until the purchaser produce the price, so also, the finder is entitled to detain the trove until the owner produce an equivalent for the subsistence. The finder, moreover, resembles a person who apprehends and brings back a fugitive slave, that is, in the same manner as that person is entitled to detain the slave on account of a recompense (since it may be said that *he has preserved him*) so also, the finder is at liberty to detain the trove on account of the subsistence to be afforded to it, since he has thus preserved it alive. It is to be observed that the debt for subsistence is not extinguished by the circumstance of the trove perishing in the hands of the finder, *before* his detention of it: but it is extinguished by the trove perishing in his hands *after* detention, because by *detention* it is placed in the same state as a *pledge*, and as debt is extinguished by the destruction of the pledge, so in the same manner the debt for subsistence is extinguished by the trove perishing after detention.

if, however, the trove perishes in the finder's possession, *after* detention, he has no claim.

TROVES of *lawful* articles and of *unlawful* are the same, in this respect, that the finder is to advertise them for a year. *Shafëi* contends that an *unlawful* article is to be advertised until the owner appear, because the prophet has declared “*A trove of a FORBIDDEN thing is not lawful to any but the MOONSHID,*” (that is, the *claimant* or the *owner*;)—and it thus appearing that the trove is unlawful to any except the owner, it is indispensable that the finder advertise it until the owner appear, and he restore it to him; for it must not be bestowed in *alms*. The arguments of our doctors upon this point are twofold:—FIRST, the prophet has said, “*Advertise the trove by its marks*, and then continue to advertise it for a year,*” in which no distinction is made between a *lawful* article and an *unlawful*:—SECONDLY, the unlawful article in question is a *trove*; and if, after the expiration of the term of advertisement, it be bestowed in alms, the owner’s right of property in it still continues in force†;—and such being the case, the finder may bestow it in alms, after the expiration of the term aforesaid, in the same manner as any other *troves*.—With respect to the saying quoted by *Shafëi*, the explanation of it is, that a trove of a *forbidden* thing is lawful only to the *Moonshid*, (that is, to the *advertiser*, or *person* who makes *notification* of it,) and that it is not lawful for any person to take it for his *own* use‡. A trove of a *forbidden* thing is particularly adverted to in this saying, because such a trove must be advertised, although it appear to be the property of *strangers*, (who are continually passing through the country,) and if it were not for such an injunction, people might apprehend that, as

Troves of *unlawful* articles are to be advertised and disposed of in the same manner as those of *lawful* articles.

* Literally, “*advertise the BAG or PURSE containing the trove,—and its TYING,—and then advertise the TROVE for a YEAR.*”

† As he still has a claim of restitution. (See p. 269.)

‡ The difference here turns solely upon the sense in which the term *Moonshid* is to be taken. *Moonshid* literally signifies a *person who points to the place where any thing is lost*,—a description which applies equally to the *loser* or the *finder*. *Shafëi* takes it in the *former* sense, and *Hanefsa* in the *latter*.

being the property of strangers who will probably never return to demand it, the advertising is useless.

The claimant of a trove must prove his right by evidence: but it may be delivered to him upon his describing the tokens of it: in this case, however, the magistrate cannot compel a surrender.

If a person appear, and lay claim to a trove, it is not to be given to him until he produce evidence. If, however, the claimant describe the tokens of the trove, by mentioning the weight of the *dirms*, (for instance,) or the purse in, which they are contained, and its tying, it may be lawfully given to him:—but the magistrate is not to use any *compulsion* upon this point. *Malik* and *Shafei* allege that the magistrate may *compel* the finder to give up the trove; because he merely disputes with the claimant the *possession* of the trove, and not the *right of property* in it; and such being the case, a description of the *tokens* is made a condition, as the parties dispute concerning the *possession*, but the *production* of evidence is not made a condition, as they do not dispute concerning the *right of property*. The argument of our doctors is that *possession* or *seizin* is a right which may be desirable, in the same manner as actual *property* in a thing, wherefore no person is entitled to claim the *possession* of it but through *proof*, that is, through *evidence*, in the same manner as no one is entitled to claim the *property* in it, but through evidence:—but yet it is lawful for the finder to surrender the trove to the claimant, upon his describing the tokens, because the prophet has said “ *If the owner appear, and describe the thing which contains the trove, and the quantity of the contents, let the finder surrender it to him;*”—that is, it is *allowable* to surrender it to him; for the ordinance here is merely of a *permissive* nature, since it appears, in the *Hadees Mashboor*, that *the claimant must produce evidence, and the defendant must swear*,—which evinces that the command contained in this saying is of a *permissive* and not of an *injunctive* nature, otherwise it would not be incumbent upon the claimant to produce evidence.

The finder surrendering a trove upon

WHEN the claimant describes the tokens of the trove, without producing evidence, and the finder surrenders it to him, it is incumbent

bent on the finder to take security from him out of caution*; and concerning this point there is no difference of opinion (according to the *Ra-wáyet Sabeeb*) because here the finder requires the security for *himself*†. This is contrary to the case of security required in behalf of an *absentee heir*;—that is, where the *Kázee* distributes the effects of a person deceased among such of his heirs as are present,—in this case there is a difference of opinion concerning his requiring security of the *present* heirs, in behalf of an *absent* heir, provided such should hereafter appear,—for, according to *Haneefa*, security is not required in behalf of the absentee heir,—but according to the two disciples security is so required.

description of the tokens, without evidence, must take security from the claimant.

If any person claim a trove, and the finder verify his claim, yet some say that the *Kázee* must not *compel* him to surrender the trove;—similar to the case of an agent empowered to take possession of a deposit; in other words, if any person plead that “he is an agent” empowered to take possession of a deposit from such a person,” and the *trustee* verify his declaration, yet he is not *compelled* to surrender the *deposit* to the agent; and so here likewise. Some, on the contrary, say that compulsion may be used, because in the case in question, the owner is a person unknown, whereas, in the case of a *deposit*, the owner of the deposit is a person who is *known*, whence the possessor cannot be *compelled* to surrender it to the agent, he not being the *owner*.

The finder is not to be *compelled* to surrender the trove, although he acknowledge the right of the claimant.

THE finder must not bestow the trove in alms upon a *rich* person, because the prophet has said, “*If no owner of a trove property appear,*

A trove cannot be bestowed in alms

* Left another person should afterwards appear, and prove the trove to belong to him, by *evidence*.

† He takes the security in his own behalf, and not in behalf of any future possible claimant, who, if he should appear, has recourse to *him* for restitution.

upon a *rich*
person;

“BESTOW IT IN ALMS;”—and it is not lawful to bestow alms upon an *opulent* person; a trove, therefore, resembles *Zakât*.

nor can the
finder (if *rich*)
lawfully con-
vert it to his
own use.

If the *finder* be in opulent circumstances, it is not lawful for him to derive any advantage from the trove. *Shafêi* affirms that this is lawful, because the prophet said to *Yewâbee*, who had found an hundred *denârs*, “If the owner come, surrender the trove to him; but if not, make use of it;—and yet *Yewâbee* was in opulent circumstances. Moreover, the use of the trove is allowed to the finder, where he happens to be in indigent circumstances, only in order that this permission may be a *motive* to him to take up the trove, in such a manner that it may be preserved; in other words, the finder, in hope of this advantage, will take up the trove from the ground, and it will thus be preserved from perishing. Now, the *poor* and the *rich* are both alike in this particular; and consequently, the finder who is *rich* may lawfully convert it to his own use, in the same manner as one who is *poor*. The argument of our doctors is that a *trove* is the property of *another*, and hence it is not allowable to derive an advantage from it without his permission, because the passages in the sacred writings which prohibit the enjoyment of another’s property are *generally* expressed.—The use, moreover, is permitted to the *poor*, (contrary to what *analogy* would suggest,) in consequence of the saying of the prophet already mentioned, and of the opinion of all the doctors; and therefore, any *others* than those remain under the *original* predicament, which is an *inhibition* of the use.—With respect to what *Shafêi* urges, (that “the use of the trove is allowed to the finder where he happens to be in indigent circumstances, only in order that this permission may be a motive to him to take up the trove, so that it may be preserved, in which particular the *rich* and the *poor* are both alike,”)—we reply that this reasoning is not admitted; because a *rich* person may sometimes take up a trove from the ground under the idea that he may himself possibly become a *pauper* within the term prescribed for advertising; and a *poor* person, on the other hand, may sometimes

sometimes neglect to take up a trove, under the idea that he may, possibly, become *rich* within that term; what *Shaf'ii* urges, therefore, under this idea, is no ground of argument. With respect to the instance adduced of *Yewâbee*, it is to be considered that he converted the trove to his own use by permission of the *Imâm*; and the use of a trove, by permission of the *Imâm*, is lawful.

If the finder of a trove be *poor*, he need not hesitate to make use of the trove*, since in such a disposal of it a kindness is performed both to the *owner* and to the *finder*†.—Upon the same principle, also, it is lawful to bestow it upon any *other* poor person: thus if the finder be *rich*, and his parents, children, or wives *poor*, he may bestow the trove in alms upon them, for the reason above alleged.

The finder, if *poor*, may convert the trove to his own use; or, if *rich*, may bestow it upon his poor relation.

* After having duly advertised it, as before directed.

† Because the *finder* thus obtains a relief from his wants, and the *owner* has the merit of the charity.

H E D A R A.

B O O K XII.

Of IBBÂK, or the Absconding of SLAVES.

Distinction
between a
fugitive slave
and a *strayed*
slave.

AN absconded male or female slave is termed *Abik*, or *fugitive*; but an *infant* slave, who wanders away in consequence of want of understanding, is termed *Zâl*, or *strayed*, and not *fugitive*.

It is laudable
to apprehend
a fugitive
slave;

THE apprehending of a fugitive slave is laudable with respect to those who are enabled to apprehend him, because this gives life to the owner's right, since a fugitive slave is the same as one who is *dead* with respect to his *owner*. With respect to *strayed* slaves, some say that the taking of them is also laudable; but others, on the contrary, maintain that it is laudable to let them go, since it is most probable that such a one will not wander *far*, and consequently, that the owner will recover him*.

* Without being subjected to the expence of a *Jœâl*, or reward, for the recovery of him.

THE person who seizes an absconded slave must bring him before the *Sultan**, he not being of *himself* equal to the charge of him: contrary to the case of a *troue*, which any person is equal to the care of. And upon this person delivering the slave to the *Sultan*, he [the *Sultan*] must imprison him:—but if a person deliver a *strayed* slave to the *Sultan*, he must not imprison him;—because no confidence can be placed in a *fugitive* slave, as it is to be apprehended that he may again abscond: contrary to one who is only *strayed*.

and he must be taken before the *Sultan*, who must imprison him.

If a person, having seized and brought a fugitive slave from the distance of three days journey, or upwards, deliver him to his master, it is incumbent upon the master to pay that person the *foûl*, or reward, which is *forty* DIRMS. And if he have apprehended and brought him from a distance *short* of three days journey, he is entitled to a proportional recompence. This is upon a favourable construction. Analogy would require that nothing whatever be due to him, except where it has been stipulated before-hand; (and such is the opinion of *Shafëi*;) because the person in question, in seizing and bringing back the slave, has acted *gratuitously*. Thus the case resembles that of a *strayed* slave; in other words, as nothing is due to a person who restores a *strayed* slave to his master, (because of this being a *gratuitous* act,) so in the same manner nothing is due for the *fugitive* slave where he is restored to his master, for the same reason. The reasons for a more favourable construction of the law upon this point are threefold:—FIRST, the companions all agree that a reward is due; some of them, however, contend that this reward is *forty* DIRMS, whilst others say that it is *less* than forty; and hence it is that we say *forty* DIRMS are due in a case of distance of three days journey, and *less* than forty, where the distance is *short* of three days, in order that the different rates [established by the

The restorer of a *fugitive* slave is entitled to a reward of *forty dirms*, or less, in proportion to the distance from which the slave is brought, within three days journey:

* By this term it is always to be understood the *sovereign*, or *chief magistrate*.

companions]

but no re-
ward is due
to the restorer
of a *strayed*
slave.

companions] may be thus reconciled:—SECONDLY, if a reward be made incumbent, men's property will be secured, because people will seize fugitive slaves and restore them to the owners, in hopes of the reward;—for the performance of acts merely from a motive of *conscience* seldom occurs in the world, more especially in the *present* times:—(the rating the premium at forty *dirms*, or less, is grounded upon oral testimony*; but no report has reached us concerning *strayed* slaves, and hence, in their case, nothing is declared to be due:)—THIRDLY, in the instance of *strayed* slaves the necessity of conservation is less urgent than in the case of *fugitive* slaves, because a *strayed* slave does not *conceal* himself,—whereas a fugitive slave endeavours to keep concealed; a *fugitive* slave, therefore, is essentially different from a *strayed* slave; and hence a premium is established in the case of the *former*, and not in the case of the *latter*. As to what was before advanced, (that, “if a person apprehend and bring back a fugitive “ slave, from a distance short of three days journey, he is entitled to “ a proportional recompence,”—(it is to be observed that if the service be calculated at the rate of value of the established premium, there will be thirteen *dirms* and one third of a *dirm* due for each day “ invariably, which is what some have alleged. The best method, however, is to refer this point to the discretion of the magistrate, or to leave it to the parties themselves, (namely, the *restorer* of the slave and the *owner*,) in which case the restorer is entitled to whatever sum they may agree upon.

Rule where
the value of
the slave falls
short of forty
dirms.

If the value of the fugitive slave be *short* of forty *DIRMS*, the owner must be directed to pay to the restorer *thirty-nine* *DIRMS*, provided he have seized and brought him back from a distance of three days journey.—Our author remarks that this is the opinion of *Mohammed*.—*Abou Yousuf* maintains that he is entitled to *forty* *DIRMS*, be-

* This phrase is applied (in law language) to any thing which is not founded either upon the text of the *Koran*, or the ordinances of the prophet.

cause,

cause, as the rate is so established upon the authority of the sacred writings*, it cannot be lessened; whence it is that if the restorer of the slave and the owner were to enter into a composition at a rate *above forty DIRMS*, it would be unlawful;—but if, on the contrary, they agree for *fewer than forty*, it is lawful, because as the restorer is at liberty to decline accepting of *any part* of the forty *dirms*, it follows that he may lawfully accept of *less* than that sum. The argument of *Mohammed* is that the design, in establishing a reward, is to excite and encourage men to restore fugitive slaves to their owners, in order that the proprietor may recover his property; and hence *one DIRM* is deducted, in order that *some part* of the fugitive may remain for his master, and that the advantage of instituting a reward may be ascertained †.

AM-WALIDS and *Modabbirs* are, with respect to the *reward*, considered in the same light as *absolute slaves*, provided they be restored before the demise of their owner, because slaves of the above descriptions are a *property* to their owner, and the restoration of them is a *vivification* of them with respect to him; the reward, therefore, is due:—but where they are restored after the owner's decease, no part of the reward is due, because slaves of both the above descriptions are free upon the demise of their master: contrary to the case of *absolute slaves*, since they do *not* become free upon their master's death, for which reason the reward for restoring them is due, although they be restored *after* the master's decease.

A reward is due for *Am-Walids*, and *Modabbirs*, provided they be restored before the owner's death;

and for *absolute slaves*, although they be not restored until *after* his death.

* This apparently contradicts what was before mentioned, that *the rating of the premium at forty DIRMS, or less, is grounded upon ORAL TESTIMONY*: the *oral testimony* however relates solely to the additional words, *or less*.

† The doctrine of *Mohammed*, as stated in the case in question, is according to the *Persian* version of the *Hedaya*. The translator, conceiving it his duty to adhere closely to his text, has not ventured to alter it. The passage, however, is much more clearly expressed in the *Arabic* copy, and in a way to which the reasoning of *Mohammed* is directly applicable (which is not the case *here*:)—It simply says “*If the value of the slave be short of forty DIRMS, let the restorer be decreed the value, except a DIRM.*”

There is no reward for restoring a slave to a father or son (living in the same family,) or to a husband or wife.

If the *father*, or the *son* of the owner, living in the same family, restore a fugitive slave, no reward whatever is due; (and the same rule obtains where, of a husband and wife, either restores a fugitive slave to the other;) because, it is customary for such relations to act gratuitously towards each other.

The death of the slave in the hands of the person who takes him does not occasion responsibility:

If a fugitive slave abscond from the hands of the person who apprehended him, or die whilst in his possession, no indemnification whatever is due from him to the owner, because the slave is a *trust* in his hands. This, however, obtains only where the person who took him has called people to witness that "he seized such a slave, "with a view of restoring him to the owner,"—(in the manner already mentioned in treating of *troves*.)—In the case here supposed, no reward whatever is due to the person who apprehended the slave, because *he* stands in the predicament of a *seller*, and the *master* of the slave stands as a *purchaser*; (whence the former is at liberty to detain the slave on account of the reward, in the same manner as a seller is at liberty to detain the article sold, until he receive the price;) and such being the case, no part of the reward is due to the person who takes the slave, in the same manner as no part of the price is due to the seller, where the article sold perishes in his hands.

but the taker is not entitled to a reward.

The reward cannot be evaded by emancipating the slave on the instant of restoration.

If the master of a fugitive slave emancipate him on the instant of his being brought to him, and before the person who took him has delivered him up, he is considered as being seized of the slave at the moment of emancipation, in the same manner as where the purchaser of a slave emancipates him before seizure, in which case he is considered as having taken possession of him on the moment of emancipation: and upon the same principle, if the master of the slave *sell* him to the person who apprehended him, he is considered as being seized of him on the instant of sale, on account of his thus securing to himself a recompence for the slave in the *price* of him.

It is incumbent upon the person apprehending a fugitive slave to call some persons to witness that "he takes this slave in order to restore him to his master." It is moreover to be observed that it is incumbent upon the taker (according to *Hancesa* and *Mohammed*,) thus to call witnesses *at the time of his taking the slave*; inasmuch that if a person restore the slave to his master *without* having called people to witness at the time of seizing him, he is not entitled to any reward; because his neglecting to call witnesses argues that he has taken the slave for *himself*; and the case is consequently the same as if a man were to purchase the slave from the person apprehending him,—or to accept of him, from the same person, as a gift,—or, as if the slave had descended to him from the same person by inheritance,—and this man, so possessing him by purchase, gift, or inheritance, then restore the slave to his owner, in which case no reward is due to him, because he here restores the slave to the proper owner *for his own advantage*; in other words, in consequence of getting possession of the slave he becomes responsible for him, and by returning him to his owner he is discharged from the responsibility; his returning him, therefore, with a view to discharge himself from responsibility, is in fact returning him with a view to *his own advantage*: no reward, therefore, is due to him,—unless, at the time of purchase, he had called some persons to witness that "he purchased this slave with a view to restore him to his owner," in which case the reward is due to him: but the *purchaser*, in this instance, is considered as having acted *gratuitously* in paying a price for the slave*.

The taker must declare, to witnesses, his design in seizing the slave,

or he is not entitled to the reward.

If the fugitive slave be *in pawn*, the reward for restoring him is due from the person detaining him in pawn; because the restorer has given life to the property involved in the slave by bringing him back; and the property involved in him is the right of the person to whom

The reward for taking a pawned fugitive slave is due from the pawnor.

* And consequently, the purchaser has no claim upon the proprietor for the price he has paid.

he is pawned, since it is only through means of this property that he can recover what is due to him: the reward, therefore, is due from the person who has him in pawn,—and this whether the slave be restored during the life of the pawner, or after his decease, because a contract of pawn is dissolved by the decease of the *pawner*. This is where the *value* of the slave does not exceed the debt of the pawner: but if the value exceed the debt, the reward is due from the person who has him in pawn, to the amount of the debt, and the remainder from the *pawner*, because the right of the creditor who receives a pawn extends only to what it involves. The reward, therefore, is subject to the same rule with the price of *medicine*, or quittance for an offence;—that is to say, if a pawned slave fall sick, and medicine be purchased for him, the price for the medicine is due from the person having him in pawn to the amount of the debt involved in the slave, and the remainder from the *pawner*, where the value of the slave exceeds the debt;—and in the same manner, if a pawned slave commit an offence, it is incumbent upon the creditor who has him in pawn to pay the quittance of offence to the amount of the debt involved in the slave, and thus release him, the *pawner* paying the remainder; and the same in the case here treated of.

Case of a fugitive slave involved in debt.

If a fugitive slave be involved in debt, the reward for apprehending him is due from his owner, where *he* chuses to discharge the debts: but if the owner do not chuse this, the slave is to be sold for the discharge of the debts,—the reward to be previously paid out of the *price* for which he is sold, and the remainder afterwards distributed among his creditors; because the *reward* is an expence attendant upon the *right of property*; and the right of property in the slave resembles a *suspended property*, as it is held in suspense between two parties; (since, if the master chuse to defray the debts, the right of property rests with *him*,—or, if he prefer *selling* the slave, it rests with the *creditors*;) and the *right of property* thus remaining in suspense, that which is an expence attendant upon the right of property (namely

(namely the *reward*) also remains in suspense:—the reward, therefore, is incumbent upon him in whom the right of property rests.

If a male or female fugitive slave commit an offence, the reward for apprehending is incumbent upon the master, provided he agree to pay the *Fiddeeya Janhayat*, or quittance of offence, because the advantage of the slave results to his master: but if he prefer surrendering him to the party-aggrieved, (or avenger of the offence,) the reward in this case is due from the party to whom the advantage of the slave accrues.

Case of a fugitive slave liable to fine for an offence.

If a person make a gift of a slave to another, and the other take possession of him, and the slave abscond from the *donee*, and a *third* person seize and restore him to the *donee*, the reward is due from the *donee* although the *donor* resume his share from the *donee* after restoration; because it is not in consequence of the restoration to the *donee* that the advantage of the slave accrues to the *donor*, [after resumption,] but rather in consequence of the *donee* not having disposed of the slave in any way after restoration,—since, if the *donee* had so disposed of him, (by *manumission*, *sale*, or so forth,) the resumption could not have been effected.

Case of a gift-slave absconding from the *donee*.

If the master of a fugitive slave be an *infant*, the reward is due from his property, because the reward is an expence attendant upon the right of property. If, however, the restorer of the slave be the infant's *guardian*, no reward whatever is due to him, because he is *manager* of the infant's concerns, and consequently it is his *duty* to seek after and recover the slave. In the same manner, also, if an *orphan* be resident in any person's family, and this person seize and restore a fugitive slave belonging to the orphan, no reward whatever is due to him, as it is his duty to seek for and restore the slave. In the same manner, moreover, no reward is due to the *Sultan* where he restores a fugitive slave to the owner.

The guardian of an *infant* or *orphan* is not entitled to any reward for restoring a fugitive slave.

H E D A R A.

B O O K XIII.

Of MAFKOODS, or MISSING PERSONS.

Definition of
Maftood.

MAFKOOD, in its literal sense, means *lost* and *sought after*. In the language of the LAW it signifies a person who disappears, and of whom it is not known whether he be *living* or *dead*, or where he resides.

When a person disappears, the *Kāzee* must appoint a trustee to manage his affairs;

If a person disappear, and it be not known whether he be *dead* or *alive*, or where he resides, the *Kāzee* must appoint some person to look after his property, and to manage his affairs, and maintain his rights; because the *Kāzee* is appointed for the purpose of attending to the interests of all such as are unable to attend to their own concerns; and as a *missing person* is of this description, (whence he stands in the same predicament with an *infant* or an *idiot*)—it is for his interest to appoint a person to look after his property and manage his affairs.—By what is above stated, that “ the person appointed by the *Kāzee* “ shall

“ shall maintain the rights of the missing person,” is meant that this person shall take possession of all acquisitions arising to the *missing person* from his tenements, lands, or effects, and also of such debts as are acknowledged by his debtors;—and that he shall also prosecute for debts owing in consequence of contracts entered into by *himself* and which are disputed by the debtor, as the rights of the contract appertain to him, he being the *contractor*:—but he is not to prosecute on account of debts owing in consequence of any contract entered into by the *missing person*, and which are disputed by the debtors; nor can he prosecute for the *missing person*’s share in *lands* or *effects*, in the hands of a third person, who disputes the same; because he is neither the *principal*, nor the *deputy* of the principal, being no more than merely an *agent for seizure* on the part of the *Kâzee*, who is not empowered to prosecute, according to the united opinion of our three doctors:—for their only difference of opinion is with respect to an agent for seizure appointed by the proprietor himself, in a case of debt, whom *Haneefa* holds to be empowered to prosecute, whereas the two disciples deny him this power.—The reason of this is that if it were lawful for the *Kâzee*’s agent for seizure to prosecute, and he were to prosecute accordingly, and the debtor to produce evidence proving that the *missing person* had already received the debt, or discharged it, the *Kâzee* must necessarily pass a decree accordingly, and this would be a decree against an absentee, which is unlawful.—It is not lawful for him, therefore, to prosecute, except where the *Kâzee* is of opinion (with the sect of *Sbafîi*.) that it is lawful to pass a decree against an absentee, and he directs accordingly, in which case it is lawful, because a decree is of force where it is passed in any case concerning which there is a difference of opinion †.

who is empowered to take possession of all acquisitions arising to him;

but cannot prosecute for disputed debts, or deposits.

OBJECTION.

- On behalf of the *Maftood* or missing person.

† That is, where the *Kâzee* may happen to dissent in opinion from the *Haneefite* doctors. The *Arabic* copy simply says “ in which case it is lawful, because the *Kâ-*”
 “ *zî* is a person supposed to be possessed of judgment and learned in the law.” What is here

OBJECTION.—The point upon which the difference of opinion rests, on the present occasion, is the *decree itself*; and hence the case requires that the validity of the decree be suspended upon the warranty of another *Kázee* *.

REPLY. The *decree itself* is not what the difference of opinion rests upon in the present instance, but the *cause* of the decree, namely, the *evidence*, the point of difference being, merely, whether evidence, where there is no actual prosecutor, amounts to proof?—and where the *Kázee* is of opinion that the evidence amounts to proof, and directs accordingly, his decree is legal and valid.

The *missing person's* perishable effects must be sold;

but not those which are *unperishable*.

—It is to be observed that, if there be, among the effects of the missing person, articles of a perishable nature, (such as *fruit*, and so forth) the *Kázee* must sell them; because, as the preservation of them both in *substance* and in *effect* is impracticable, they are to be preserved in *effect*. But he is not to sell any articles not liable to perish, either on account of subsistence, or for any other purpose; because the *Kázee* is invested with authority, with respect to an absentee, for the *conservation of his property*, and hence it is incumbent upon him to preserve it in *substance* where that is practicable.

Subsistence must be afforded, out of the effects, to the *parents and children of the missing person*; and to all others who, without a decree, were entitled to it during his *presence*.

The *Kázee* is to give subsistence to the wife and children of a *missing person* out of his property. This rule is not restricted to his *immediate children*, but extends to all related to him in the line of paternity, such as the father, the grandfather, the son's son, and so forth; for it is a rule that every person entitled to a subsistence from the property of the *missing person* whilst he was present, independent of an order from the *Kázee* (such as his infant children, and adult daughters, or adult sons who are disabled) must in his absence be

here advanced affords a striking instance of the power of a *Kázee*, and the latitude allowed to him in passing his decrees.

* Because this *Kázee* being himself a representative of the *Adyhood*, or missing person, and consequently a party concerned in the decree, cannot carry it into effect, without such authority.

furnished

furnished with a subsistence, out of his property, by the *Kázee*:—but to those who, whilst the missing person was present, had no right to subsistence independent of an order from the *Kázee*, (such as brothers, sisters, or maternal uncles or aunts,) no subsistence is, in his absence, to be furnished by the *Kázee*, because these are entitled to a subsistence only *through a decree*, and a decree against an absentee is illegal. By the *property* of the missing person, as here mentioned, is meant *money*, because the right of the above persons is *meat* and *clothing*, and where those are not to be found among the missing person's effects, there is a necessity for the *Kázee* to decree the *value*; and the *value* consists of *cash*. Bullion (that is, uncoined gold and silver) is in this respect subject to the same rule with *cash*, since that also admits of being given as value, in the same manner as *cash*. This is where the *Kázee* has money in his hands. If, however, there be no money in his hands, but there happen to be some in trust, in the hands of another person,—or a debt owing from some other person, the *Kázee* is in that case to provide the subsistence from such deposit or debt, where the trustee or debtor acknowledges the *deposit* or *debt*, and also the *marriage* or *parentage*. This acknowledgment, however, is necessary only where these points are not fully known to the *Kázee*; for if they be fully known to him, the acknowledgment is not requisite.—If, on the other hand, some of these points be known, such as the *debt* and the *deposit*,) and others unknown (such as the *marriage* or the *parentage*)—or *vice versa*, in this case the acknowledgment is requisite with respect to that which is *unknown*: this is approved. If the trustee or debtor furnish the subsistence without an order from the *Kázee*, the trustee is responsible for such disbursement, and the debtor is not discharged from his debt, because in so doing they have not paid any thing either to the owner or to his representative: contrary to where they furnish subsistence by order of the *Kázee*, because he appears as representative of the owner.

Where there are no effects in the *Kázee's* hands, he may furnish the subsistence from *debt*, or *deposit*, the property of the missing person.

If the trustee or debtor *deny* the deposit or debt, together with

the marriage and parentage, or if they deny the marriage and parentage only, in this case the persons entitled to subsistence cannot be admitted, as plaintiffs, to prove and establish those points which the trustee or debtor denies; because a claim is not admitted, unless it be laid against either the *principal*, or his *representative*; and the principal, in the present instance, is absent; and the debtor or trustee are not either *actually* or *virtually* his representatives:—they evidently are not *actually* so, because he has not constituted any person his agent; nor are they *virtually* so, because, in the prosecution of the plaintiff's claim against the absentee, the specification of the *occasion* * of the claim is no good plea for the establishment of his right,—(namely, subsistence from the property in the debtor's or trustee's hands,)—since, in the same manner as subsistence is due from *that* property, it is also due from *any other* property belonging to the missing person:—the debtor or trustee are therefore not *virtually* the missing person's representatives.

The *Kāzee* cannot effect a separation between a missing person and his wife.

The *Kāzee* is not empowered to effect a *separation* between a missing person and his wife. *Mālik* maintains that, at the expiration of four years, the *Kāzee* may pronounce a separation, after which the wife is to observe an *edit* of four months and ten days, such being the *edit* of widowhood,—and she may then marry whoever she pleases; because *Omar* thus decreed with respect to a person who disappeared from *Medina*; and also, because a missing person, by his absence, obstructs the woman's right:—the *Kāzee*, therefore, must pronounce a separation between the parties after the lapse of a certain time, because of the analogy this case bears to that of *Aila*, or of *impotence*;—that is to say, in the same manner as, in a case of *Aila*, an irreversible

* Meaning, the circumstance of “the trustee or debtor having property belonging to the missing person in his hands,” which is not admitted as a plea on behalf of the plaintiff, since his subsistence is equally due from any other part of the missing person's property.

divorce

divorce takes place at the end of four months*, on account of the husband, by *Aila*, obstructing his wife's right,—and in the same manner also as, in a case of impotence, the *Kāzee* pronounces a separation † at the end of a year, on account of the husband thus obstructing his wife's right,—so likewise, in the case in question, the *Kāzee* must pronounce a separation, for the same reason:—and the case of *absence* being equally analagous to a case of *Aila* and of *impotence*, the length of the term is adjusted with a regard to *both*, by adopting the number *four* from *Aila*, and the term *year* from impotence, so as to make practice in *this* particular accord in the same manner with the other two. The arguments of our doctors upon this point are twofold.—FIRST, the PROPHET once declared, with respect to the wife of a missing person, “*She is his wife until such time as his DEATH or DIVORCE shall appear:*” and *Alee* also said, with respect to the wife of a *Mafkood*, “*She is a mourner, wherefore she must be patient, until she be perfectly informed of his death, or of his having divorced her.*”—SECONDLY, the existence of the marriage is notorious; and as the mere *disappearance* of the husband is not a sufficient cause of separation, and his death is a matter of uncertainty, it follows that the marriage cannot be dissolved, because of the *doubt*. With respect to the authority of *Omar*, as cited by *Mālik*, we reply that he afterwards adopted the opinion of *Alee*.—As to what he farther urges respecting the analogy between the case in question, and a case of *Aila*, it is not admitted; because *Aila*, in times of ignorance, was an *immediate* divorce, but the law afterwards constituted it a *deliberate* divorce ‡, and hence it is that *Aila* occasions a separation §.—In the same manner also, the analogy urged by him between the case in question and a case of *impotence* is not admitted;—because where a

* See vol. I. p. 306.

† See vol. I. p. 354.

‡ *Arab. Talāk Mawjil*, meaning a divorce which is to take place *within a certain time*.

§ That is to say, it is for *this* reason, and *not* because of the husband obstructing his wife's right, as supposed by *Mālik*.

husband *disappears*, it is possible that he may re-appear, whereas it is not possible that an impotent person should recover his virility, after his impotence has continued for above a year.

The missing person is to be declared a *defunct*.

WHEN one hundred and twenty years shall have elapsed, from the day of the missing person's birth, he is to be declared *defunct**.—The compiler of *Hedaya* remarks that *Haffan* has related this as an opinion of *Haneefa*. According to the *Zabir Rawdyet*, this point is to be determined by the decease of the *co-evals* of the missing person, or of his equals—that is, those who are known to resemble him in health and habits of body. It is recorded from *Aboo Yoosaf* that the term is one hundred years.—Some of the learned, again, fix it at *ninety* years. *Analogy* requires that the term should not be fixed at any particular period, such as *one hundred* years, or *ninety* years, since to fix a time merely from *judgment* or *opinion* is illegal: but yet it is requisite that it be fixed by some specific standard, such as the demise of the missing person's co-evals, because, if no criterion whatever were established, his decease could never be declared. The *benevolence* of the law, however, suggests that the term be fixed at *ninety* years, as this is the shortest *fixed* term mentioned†, and it is difficult to ascertain any thing respecting the circumstances of the missing person's co-evals or equals.

at the end of ninety years from his birth:

when his wife is to observe an *edit* of widowhood;

and his property is divided among

UPON the death of the missing person being duly declared, his wife must observe her *edit* for four months and ten days from the date of the declaration, such being the *edit* of *widowhood*; and his property is to be divided among such of his heirs as are then living: the case, therefore, is the same as if he had actually died upon the

* This is the rule in the *Senna*. The compiler of the *Hedaya*, however, has fixed it at *ninety* years, as appears a little below.

† By any of the law doctors or commentators.

instant of the declaration, and hence any person who died previous to the declaration does not inherit of him.

his living heirs.

If the relation of a missing person die during his disappearance, the missing person is not an heir, because his existence at the time is established merely from *circumstances*, as having been once known, and consequently accounted to continue so long as nothing appears to the contrary:—now mere *circumstantial* evidence is but *weak*, and therefore incapable of constituting proof to a claim (that is, to the establishment of a thing as yet *un-established*)—although it constitute proof sufficient for *repulsion*, (that is to say, to prove the continuance of a thing *already established*.) With respect to the expression “the missing person is not an heir,”—it means that, whatever may be his portion of inheritance, he does not obtain a property in it, but it is held in *suspence*;—because his being in life is doubtful; and this is a sufficient cause of *suspence*.—If, therefore, he afterwards appear to be living, it goes to him;—but if there be no evidence of his being in life when ninety years have elapsed, his portion, which has been so suspended, is then to be distributed among those who were heirs to the original proprietor at the period of his demise, as in the case of embryos in the womb. In the same manner, also, if a person make a bequest to a missing person, and the testator die, the bequest does not take place, but is held in *suspence*, because *bequest* stands upon a similar footing with *inheritance*.

A missing person's right of inheritance from a relation cannot be established during his disappearance:

but his portion is held in *suspence*;

and, at the end of ninety years (if he do not appear in the interim) is divided among the other heirs

It is a rule that if there be another heir beside the missing person; who is not entirely precluded by the missing person, but whose right is diminished by his intervention, this heir is to receive that which is the *least* of the two portions of inheritance, and the remainder is held in *suspence*. If, on the other hand, there be another heir, who is entirely precluded by the *missing person*, no part of the inheritance is to be paid to him, but the *whole portion* of inheritance must be held in *suspence*. An example, in illustration of this case, is as follows.

Dis: the inheritance in case of a co-heir.

A person.

A person dies, leaving two daughters, and a son who has disappeared; and also, a son's son, and a son's daughter; and his estate is in the hands of a stranger;—and the above heirs, and the stranger, all agree that the son of the deceased is a *missing person*; and the two daughters demand their inheritance; in which case they are paid their moiety out of the deceased's estate, as this is their undoubted share: but the other moiety, which is the portion of the *missing person*, is held in suspense, and no part of it paid to the son's children, because they are entirely precluded by the missing person if he be living, and are therefore not entitled to receive the inheritance, because of the doubt:—and this remaining moiety is not to be taken out of the hands of the stranger, unless he be discovered in some dishonest practices.—Apposite to the example of the missing person is the case of a foetus in the womb, for whom a child's inheritance is reserved, according to an opinion upon which decrees are passed.—If, also, there be another heir beside the foetus, who is not in any circumstance precluded, nor his portion altered by the intervention of the *fetus*, his compleat portion is paid to him: but if this heir be such as is entirely precluded by the intervention of the *fetus*, nothing whatever is paid to him:—thus, if a man die, leaving a maternal sister, and a pregnant wife, nothing whatever is paid to the sister, as she is entirely precluded from inheritance by the intervention of a child, whether *male* or *female*. If, on the other hand, the heir be one whose share is *altered* by the intervention of the *fetus*, in this case the *smaller* of the two portions is paid to him, as this *smaller* share is his undoubted right,—in the same manner as in the case of a missing person.—For instance, a man dies, and leaves a pregnant wife, and a mother who acknowledges the pregnancy, in which case the wife is paid an *eighth* and the mother a *sixth*,—because, if the *fetus* be born *alive*, the wife would receive an eighth, and the mother a sixth; but if it be *not* born alive, the wife would receive a fourth, and the mother a third:—a sixth and an eighth are therefore paid immediately, as these are their portions at all events.

H E D A Y A.

B O O K XIV.

Of SHIRKAT, or PARTNERSHIP.

SHIRKAT in its primitive sense, signifies the conjunction of two or more estates, in such a manner, that *one* of them is not distinguishable from the *other*. The term *Shirkat*, however, is extended to *contracts*, although there be no actual *conjunction of estates*, because a contract is the *cause* of such conjunction. In the language of the LAW it signifies *the union of two or more persons in one concern*. Definition of *Shirkat*.

PARTNERSHIP is lawful, because in the time of the prophet men were accustomed to have transactions in partnership, and the prophet confirmed them therein. Partnership is lawful;

PARTNERSHIP is of two kinds, *Shirkat Milk*, or partnership by *the right of property*, and *Shirkat Akid*, or partnership by *contract*. and of two kinds; by right of property, and by contract.

SHIRKAT

Partnership
by right of
property is
either *optional*,

or *compulsive*;

and does not
admit of ei-
ther partner
acting with
respect to the
other's share.

SHIRKAT MILK applies where two or more persons are proprietors of one thing;—and it is of two different natures, *optional* and *compulsive*:—*optional*, where two persons make a joint purchase of one specific article; or where it is presented to them as a gift, and they accept of it; or where it is left to them, jointly, by bequest, and they accept of it;—or where they both obtain possession, by conquest, of one specific article in an enemy's country;—or where they unite their respective properties in such a way as that *one* is not distinguishable from the other, (such as the mixture of *wheat* with *wheat*,)—or where it may be *difficult* to distinguish them, (as in a mixture of *wheat* with *barley*:)—and *compulsive*, where the properties of two persons become united without their act, under such circumstances as render it difficult or impossible to distinguish between them; or, where *two* persons inherit *one* property. In this species of partnership, therefore, it is not lawful for one partner to perform any act with respect to the other's share, without his permission, each being as a *stranger* with respect to the other's share. It is, however, lawful for either partner to sell *his own* share to the other partner, in all the cases here stated:—and he may also sell his share to *others*, without his partner's consent, excepting only in cases of *association* or *admixture* of property, for in both these instances one partner cannot lawfully sell the share of the other to a third person without his partner's permission. The distinctions upon this point are related in the *Kafayat-al-Mountibee*.

Partnership
by contract

SHIRKAT AKID, or *partnership by contract*, is effected by *proposal* and *consent*,—that is, by one person saying to another, “ I have “ made you my partner in such a property,” &c. and the other replying “ I consent:” and it is a condition of the contract that the concern respecting which it is made be of such a nature as to admit of delegation, in order that the acquisition arising from it may be participated in by both parties, and that thus the effect or design may be

be established,—in other words, that the acquisition may become equally the property of both.

PARTNERSHIP *by compact* is of four kinds, viz.

- I. *Shirkat-Mofâwizat*, or partnership by *reciprocity*.
- II. *Shirkat-Aimân*, or partnership in *traffic**.
- III. *Shirkat-Sinnaia*, or partnership in *arts*.
- IV. *Shirkat-Woodjoob*, or partnership upon *personal credit*.

is of four descriptions, by reciprocity, in traffic, in arts, and upon personal credit.

SHIRKAT-MOFÂWIZAT, or partnership by *reciprocity*, is where two men, being the equals of each other, in point of *property*, *privileges*, and *religious persuasion*, enter into a contract of co-partnership;—because this species of partnership is an *universal* partnership in all transactions, where each partner reciprocally commits the business of the partnership to the other, without limitation or restriction; for the term *Mofâwizat*, in its literal sense, means *equality*. It is therefore indispensable that a perfect equality exist throughout, in the *property*, that is, in the *partnership capital*, such as *dirms* and *decnârs*.—(No regard, however, is paid to an excess in any thing *beyond* the partnership capital, such as goods or effects, lands, or debts.) In the same manner, it is indispensable that an equality exist with respect to *privileges*†; because, if either partner were endowed with privileges not vested in the other, there could be no perfect equality. In the same manner also, equality is indispensable in point of *religion* and of *sect*, as shall be hereafter demonstrated. Partnership by reciprocity is lawful, upon a favourable construction;—but, according to analogy, it is *unlawful*. This, also, is one opinion of *Shafei*.

Description of partnership by reciprocity.

It requires equality in point of capital.

and of privileges;

and similarity of religion and of sect.

* The commentators define it *partnership in purchase and sale*. The term does not admit of any *literal* translation.

† Arab. *Tifirraf*; that is, *power of action*.

Málík says “ I know not what *Mofáwizat* is ! ”—Analogy would suggest that a partnership of this description is unlawful,—because it includes a power of agency with respect to an unknown subject, and also an obligation of security with respect to a thing undefined; and as each of these, individually, is illegal, it follows that, when united, they are illegal *a fortiori*. The reason for a more favourable construction upon this point is that the prophet has said “ Enter into “ partnerships by reciprocity, for in that there is great advantage.” In this manner, also, men had transactions together, no person forbidding them. Analogy, therefore, is abandoned. *Ignorance*, moreover, in the contract in question, is lawful as a dependant of another circumstance,—that is, as a dependant of *equality*;—in the same manner as in a contract of *Mozáribat*, where the contract comprehends a commission of agency for the purchase and sale of articles unknown, which commission is in itself illegal, but is nevertheless *legal* in a contract of *Mozáribat*, as a *dependant* of the contract; and so also in the case in question.

The term *reciprocity* must also be expressed in the contract.

A CONTRACT of reciprocity is not complete unless *reciprocity* be expressly mentioned in it, by the parties declaring “ we are partners, “ in a *partnership by reciprocity*,”—because the conditions of it cannot otherwise be known. If, however, in entering into such a contract, they declare all the conditions of it, the contract is lawful, although the term *reciprocity* be not particularly expressed in it, because regard is had to the *sense*, and not to the *letter*.

It is lawful between free adults, whether *Musulmans* or *Zimmies*.

A CONTRACT of reciprocity is lawful between two adults who are free, whether they be both *Musulmans*, or both *Zimmies*, since, in either case, an equality exists between the parties. If one of them, also, be a *scriptural Zimmie**, and the other a *Pagan*; the contract is lawful, because *infidelity* is one general description with respect to *faith*, and hence equality in point of religion exists in this instance.

* A *Jewish* or *Christian* subject of the *Musulman* government.

A CONTRACT of reciprocity is not lawful between a slave and a freeman, or between an infant and an adult; because equality does not exist in those instances;—as an adult freeman is competent to transact business, and to give bail, whereas a slave is not competent in either of those points, but by consent of his master; and an infant is not at all competent to give bail, nor to transact business, but by permission of his guardian.

It is not lawful between a slave and a freeman, or an infant and an adult,

A CONTRACT of reciprocity is not lawful between a *Musfulman* and an *infidel*, according to *Haneefa* and *Mohammed*. *Abou Yoozaf* alleges that it is lawful, because equality exists between those in point of agency and bail, since in the same manner as it is lawful for a *Musfulman* to be an agent or a surety, so is it also for an *infidel*: and with respect to those particular transactions which are lawful to *one* of these, and not to the *other* (such, for instance, as dealings in wine or pork,) they are not regarded, in the same manner as a similar difference is not regarded where a *Haneefite* enters into a contract of reciprocity with a follower of *Schafci*, for here the contract is lawful, notwithstanding the different tenets of those sects respecting wilful dealings in the offspring of *Tasmees**, which are held to be lawful by the followers of *Schafci*; but which are deemed illegal by the *Haneefites*, as being (according to them) forbidden. Such a contract, however, between a *Musfulman* and a *Zimnee* is nevertheless *abominable* (according to *Abou Yoozaf*;) as *Zimnees* frequently enter into engagements of an unlawful nature, in consequence of which a *Musfulman* might fall into what is prohibited. The argument of *Haneefa* and *Mohammed* is that the two persons in question are not upon an equality in point of *power of action*,—because, if a *Zimnee* purchase wine or pork with the capital stock, the purchase is valid, whereas, if a *Musfulman* were to

or a *Musfulman* and an *infidel*:

* *Tasmees* are camels turned loose and suffered to pasture at large without a herdsman, as being dedicated to God.

purchase these articles it is *invalid*: hence the parties are not upon an equal footing in point of *transation*.

nor between
two *slaves*,
two *infants*,
or two *Mokâtibs*.

A CONTRACT of reciprocity is not valid between two *slaves*, two *infants*, or two *Mokâtibs*, because a contract of reciprocity is founded upon each party being surety for the other, and the bail of such persons is invalid. It is to be observed, however, that on all occasions where a contract of reciprocity proves invalid from the non-existence of some of its conditions, and those conditions are not requisite in *Aimán*, (or partnership in *traffic*,) the contract of reciprocity becomes a contract of partnership in *traffic* because of the existence of all the conditions requisite in such a contract.

It compre-
hends both
agency and
bail.

A CONTRACT of reciprocity comprehends the properties both of *agency* and *bail*. It comprehends the property of *agency*, because if each of the contracting parties were not the agent of the other, the *end*, (namely, *a mutual participation of property*,) would be defeated. It also comprehends the property of *bail*, because if each party were not surety for the other, the equality, in certain particulars essential to traffic (such as the demand of payment from either of them for purchases made by the other,) could not exist.

A purchase
made by ei-
ther partner is
participated
between both;
except in ar-
ticles of *sub-
sistence*.

WHATEVER is purchased by either of two partners under a contract of reciprocity is participated of by both, except the food and clothing purchased by the partner for himself and his family;—because a contract of reciprocity requires that both parties be upon a perfect equality: and as each is the other's substitute in all dealings, it follows that a purchase made by *one* is equivalent to a purchase by *both*. This, however, is exclusive of such articles as are here excepted, (which exception proceeds upon a favourable construction,) as the articles in question must be excluded from a contract of reciprocity, necessarily, because there is perpetual occasion for them: for one partner cannot be made answerable for the other's *wants*; neither

neither can one of them expend the property of the other in the supply of his own wants; yet the purchase of these articles is indispensable; and, on account of this indispensable necessity the food and other articles mentioned appertain solely to the purchaser. (Analogy would suggest that those articles also are participated in by both partners, in conformity with what was before advanced that “a contract of reciprocity requires that both parties be upon a perfect equality.”) The seller of the food or clothing is, however, at liberty to take the price of his commodity from either partner, as he pleases; from the *purchaser*, evidently, since it was he who bought the article; and also from the *other* partner, since he is surety for the purchaser; and in this last case the other partner takes from the purchaser a moiety of what he has paid to the seller, as having discharged a debt of the purchaser out of property common to both.

WHATEVER debt is incurred by either of two partners in reciprocity, for a thing in which partnership holds, the other partner is responsible for the same, in order that equality may be established. Of those things in which partnership holds are *sale*, *purchase*, and receipt of *hire* or *wages*;—and of those in which partnership does *not* hold are *marriage*; and *divorce for a compensation*, *composition for blood wilfully shed*, and *composition for a subsistence*, and *offence against the person*.

A debt incurred by either partner is obligatory upon the other.

If a partner in reciprocity become, in behalf of a *third* person, surety for property to a stranger, it is binding upon the other partner likewise, according to *Haneefa*. The two disciples allege that it is not binding upon the other partner; because a person's becoming surety for another is a *gratuitous act**; (whence it is that the bail of an *infant*, a *Mazoon*, or *Mokatib*, is invalid,—and also, that if a per-

Bail for property, engaged in by either partner, is binding upon the other;

* All *concessions*, or acts of a *gratuitous* description, are admitted in law to affect only the actor himself.

son give bail upon his deathbed it is valid with respect to a *third* of his property only;)—and as becoming surety is a *gratuitous act*, it is equivalent to the act of granting a loan, or giving bail for the personal appearance of any one*; in other words, if one of two partners in reciprocity were to grant a loan to a stranger out of the partnership stock, it does not affect the other partner, inasmuch that the right of exacting repayment rests solely with the *lender*, as *lending* is a *gratuitous act*;—and in the same manner, if one of two partners in reciprocity become bail for the personal appearance of any one, a requisition for the production of the person bailed cannot be made to the other partner;—and so likewise in the case in question. The argument of *Hanaefa* is that bail for property is *gratuitous* in its principle, but in its consequence induces a kind of obligation or contract; because, in consequence of the bail, the surety is entitled to exact of the person bailed whatever he pays to his creditors, provided the bail had been given with his concurrence: it is therefore comprehended in a contract of reciprocity, with regard to its *continuance*; (and the circumstance of its *continuance* is the point in question, as we say “it becomes binding upon his partner *after* becoming so upon him-*self*.”) With respect to what the two disciples urge, that “a person’s becoming surety for another is a *gratuitous act*; whence the bail of an infant, a *Mazoon*, or *Mokâtib*, is invalid; and consequently, that it is not comprehended in a contract of reciprocity,” we reply, that a contract of bail entered into by *incompetent* persons is invalid in its principle; but in the case in question it is binding upon the other partner in the circumstance of its *continuance* only. Bail, therefore, with regard to its *continuance*, as being an act of *exchange*, bears a relation to *traffic*; and traffic is comprehended in a contract of reciprocity. If a *dying* person, on the other hand, enter into a contract of bail, it is valid with respect to a third of his property, in regard to its *execution*, as well as its *continuance*. Thus

* There is a material difference between bail for property, and bail for the person; as is shown at large elsewhere. (See *Bail*.)

bail for *property* is not of a *gratuitous* nature in its *continuance*, whereas bail for *the person* on the contrary, is *gratuitous*, both in its *execution* and its *continuance*. Hence bail for *property* is in no respect analogous to bail for *the person*. As to what the two disciples further urge, that “if one of two partners in reciprocity were to grant a loan to a stranger out of the partnership stock, it does not affect the other partner, as *lending* is a *gratuitous act*,”—it is not admitted; because it is recorded from *Haneefa*, that the act of lending *does* affect the partner: if however it even *were* admitted by *Haneefa*, as not affecting the other partner, we reply that a loan in *money* is equivalent to the act of lending any article of *goods* or *effects*; and hence the property paid to the lender by the borrower may be said to be the *same identical property* which he had borrowed, and not a *compensation* for it, (whence a stipulated time or place of repayment are not valid in it,) and therefore, that *lending* does not bear the property of *exchange*. All which is here advanced proceeds upon a supposition of the bail for property having been contracted with the concurrence of the person bailed. If, however, it be entered into without his concurrence, it is not binding upon the other partner, (according to the *Rawāyet Sabeeh* of *Haneefa*,) because in a bail so contracted the property of mutual obligation or *exchange* does not exist in its *continuance*. Let it be observed, also, that indemnification for usurped property, or indemnification for damages, stand on the same ground as bail for *property*, as these are of a *retributive* nature in their *principle*.

unless it be engaged in without consent of the *sureties*.

If a *property**, of such a nature as that partnership in it is valid, should fall to one of two partners in reciprocity, by inheritance,—or, if any person present him with such property, by gift, and he take possession of it,—the contract of reciprocity is null, and the partner-

An accession of property to either partner by gift or inheritance resolves a partnership by re-

* Arab. *Māl*. Meaning property in *cash*, *bullion*, or other article capable of constituting *capital stock*; in opposition to *Rabṭ* and *Matta*, that is, *specific goods* and *effects*.

reciprocity into
a partnership
in traffic;

ship becomes a *Shirkat Aindn*, because *equality in point of property* (such as is capable of constituting *capital stock*) is a condition essential to a contract of reciprocity throughout, and this does not exist in the present case, as the other partner is not a participator in the property so acquired by gift or inheritance, no principle of partnership therein appearing with respect to him. The partnership by *reciprocity*, however, is resolved into a *Shirkat Aindn*, or partnership in *traffic*, as the case admits of such a partnership, equality not being essential thereto; in *reciprocity*, on the other hand, it is essential, and consequently *reciprocity* no longer continues. The reason of this is that a contract of reciprocity is not of an *absolute* nature: now, in a contract which is not of an *absolute* nature, the rules with respect to its *continuance* and its *commencement* are one and the same; hence an increase of the capital stock [of either parties] during its *continuance* is equivalent to an *inequality* in its *commencement*; and as an inequality of capital, in the *commencement* of a partnership of reciprocity, is prohibitory to contracting it, so, in the same manner, such inequality taking place during its *continuance* prohibits it:—the contract of *reciprocity*, therefore, terminates. If one of two partners in reciprocity inherit *goods or effects**, these are his sole property; but the contract of reciprocity does not become null; (and the same rule also obtains if one of them inherit *land*;) because, as those articles are incapable of constituting *capital stock*, equality with respect to them is not a condition.

unless the property be of a nature incapable of constituting stock.

Arab. *Rakbt wa Mattâ*. In opposition to *Mâl*.

SECTION.

PARTNERSHIP by *reciprocity*, cannot be contracted but in *dirms*, *deenárs*, or fluctuating *faloos**. *Málik* alleges that such a partnership is lawful in goods and effects, and also in all articles estimable by weight, or measurement of capacity, where the species is the same, because a partnership so contracted respects a known and specified capital, whence those articles are equivalent to money. It is otherwise in a contract of *Mozáribat*; for that is restricted solely to *cash*, the *legality* of it being contrary to analogy; since under this species of engagement a profit is acquired on property concerning which there is no responsibility, (as the manager is not responsible for the *Mozáribat* stock,) and the prophet has forbidden the acquisition of gain upon property in which there is no responsibility; the contract, therefore; must not go beyond what is prescribed by the LAW; and the only thing in which the LAW declares *Mozáribat* to be lawful is *cash*. The arguments of our doctors upon this point are twofold.—FIRST, if a contract of reciprocity, in goods and effects, were held to be legal (as maintained by *Málik*,) it would necessarily induce a profit upon a property concerning which there is no responsibility; because, upon each partner in reciprocity selling his own particular capital, (consisting of *goods* and *effects*,) if the goods of one partner produce a greater price than the goods of the other, the excess of profit upon the goods of the *former* would be due to the *latter*; and this would be a profit from property for which the person who gains by it is not responsible, and in which he has no right; because in this instance the contract is

Partnership
by reciprocity
cannot be
contracted
but in *cash*;

* Arab. *Faloos*:-*Rabiba*. *Faloos* is a copper coin of uncertain value. *Faloos*:-*Rabiba* means copper coin *on which an advantage may be gained*, (owing to the fluctuation in its value,) and hence the term *Rabiba* is here rendered *fluctuating*.

connected with actual *goods*, and not with the *semblance* of them, such as *debts*; and the goods are a *trust* in the hands of each partner respectively;—whence it is evident that a profit is induced upon property concerning which there is no responsibility. It is otherwise with *cash*, because whatever either partner may purchase with the capital stock, consisting of cash, the purchase thereof is not connected with the actual capital, but with its *semblance*, namely *debt*, (since the *price* of it is a debt;)—now the purchase being connected with the *semblance* of the capital, (namely *debt*,) and the other partner also being liable to be called upon for it, (as a contract of reciprocity involves *mutual bail*,) it follows that the consequence objected (of profit upon property *concerning which there is no responsibility*) is not induced, since this is a property in which there *is* responsibility.—SECONDLY, The first transaction in *goods* and *effects* is the *sale* of them; and the first transaction in *cash* is *purchase* made with it:—now a person selling his property under the condition of another being his partner in the proceeds is unlawful, since this is endowing with a right of property in the debt, and an endowment of right in a debt, made to any other than the debtor himself, is illegal: on the other hand, his making a purchase with his own property, under the condition of another being his partner in the article purchased, is lawful, since this is endowing with a right of property in an *actual substance*, and not in a *debt*.—*Faloos-Rábiha*, or fluctuating copper coins, are connected with *dirms* and *decnárs*, [cash,] as they pass current, in the same manner as gold and silver coin. *Mohammed* is of this opinion, because he holds that *faloos* are *cash*, inasmuch that they cannot be particularised by specification; whence it is that if any person were to purchase an article, for certain *faloos*, he is at liberty to give any other *faloos* in place of them; and also, that *two* specified *faloos* cannot be sold for *one* *faloos*, according to what is established. According to the two *elders*, partnership, or *Mozáribat*, are not lawful in *faloos*, although they be *current*, as the valuation of them fluctuates from time to time, and they at length become the same as goods or effects.

(and copper
coinage is
comprehend-
ed under the
head of *cash*.)

effects*. *Abou Toosaf* is elsewhere said to entertain the same opinion with *Mohammed* upon this point. It is also recorded, from *Haneefa*, that a contract of *Mozáribat* is lawful in current *faloos*; but not a contract of reciprocity. Thus partnership by reciprocity is not lawful in any thing beyond *dirms*, *deenárs*, and current *faloos*†. It is to be observed, however, that if gold or silver bullion, by general usage, pass current for value‡, in this case partnership by reciprocity is lawful in it. This is also related in the *Kadooree*. It is asserted, in the *Jama Sagbeer*, that partnership by reciprocity is not lawful in gold or silver bullion; for, according to that authority, uncoined gold and silver are the same as household stuff, distinguishable by identic specification, and therefore incapable of constituting capital in either partnership or *Mozáribat*. It is said in the *Mabsoot*, treating of exchange, that gold or silver cannot be identified by specification, inasmuch that a contract of sale is not broken in consequence of any accident to the bullion before delivery;—(that is, if a person purchase any article, agreeing to give for it certain gold or silver uncoined, and it be lost before delivery, the contract of sale is not broken, because the gold or silver cannot be particularly specified.)—Now such being the case, it follows (according to this statement) that uncoined gold or silver are capable of constituting capital stock, in either *Mozáribat* or partnership, on this ground, that the precious metals were originally introduced for the purpose of valuation§. The opinion delivered in the *Jama Sagbeer*, however, is the most approved; because, although the precious metals were originally introduced for the purposes of traffic, yet their capacity to represent property depends upon their being coined, as when once coined, they are no longer liable

or in gold or silver bullion, where that passes in currency;

* That is, are no longer current.

† That is, such as have not yet become depreciated below the current standard.

‡ Arab. *Simn* (or *Tbinn*;) meaning a representative of property, and therefore used (in purchase and sale) to express price.

§ Arab. *Sil-Simneet*; that is, for the purpose of constituting price, or (in other words) of representing property.

to be used for any other purpose (such as making ornaments for the person, and so forth :) uncoined gold or silver, therefore, does not constitute value, except where the use of it in that way is customary, in which case it is the same as *coin*, and consequently a representative of property, and as such capable of constituting capital stock. It is to be observed that what was before advanced, that "partnership by reciprocity is not lawful in any thing beyond *dirms*, *deenárs*, and "current *saloor*," applies to all articles of weight and measurement of capacity, or which are of a *heterogeneous* nature*. The illegality of reciprocal partnership in these articles is admitted by all our doctors, *provided the partnership be contracted previous to the union or admixture of stocks*, in which case it is illegal, and each partner receives the profit arising from his own particular commodity, and the *loss* upon it also falls on him. If, also, two persons mix *homogeneous* stocks, and then enter into a contract of partnership, *Abou Yoosaf* holds the rule to be the same, and that a partnership by *right of property* is here established, not a partnership by *reciprocity*. Such, also, is the doctrine of the *Zábir Rawáyet*. According to *Mohammed*, the contract of partnership, in this instance, holds good. The result of this difference of opinion appears where the property of both partners is equal, and they stipulate a larger profit to *one*, and a smaller profit to the *other*;—for in this case, according to *Abou Yoosaf*, each is to receive in proportion to his property, and he in whose favour the *larger* profit had been stipulated is not on that account entitled to receive any excess; but, according to *Mohammed*, each is to receive agreeably to what was stipulated. The ground upon which the *Zábir Rawáyet* proceeds is that articles of weight and measurement of capacity †, and so forth, are distinguishable by specification *after admixture*, in the same manner as *before*. The argument of *Mohammed* is that the articles in question are, in one shape, *value*; for if a person were to

or (according to Mohammed) in homogeneous stocks, after admixture.

* Arab. *Adwee Mookkáríb*, that is, resembling in *appearance*, but differing in *species*.

† Meaning always *grain*, or *liquids*, such as are capable of *admixture*; in opposition to *Rakht* and *Mattá*, that is *goods* and *effects*.

sell goods for such articles, so that the price of the goods, (consisting of those articles,) is a debt upon the purchaser, it is lawful; and, in another shape, they are subjects of *sale*, as admitting of specification: attention, therefore, is paid to both these circumstances, with respect to situations both of *admixture* and of *non-admixture*: in other words, partnership in them, *before* admixture, is unlawful, as they are then subjects of *sale*; but *after* admixture it is lawful, as they then constitute *value*: contrary to the case of *goods* and *effects* of any other description, since these are not *value* in any shape. If the stocks [of the respective parties] be of two different species, such as *barley* and *wheat*, or *olives* and *pepper*, and the proprietor unite them, and then enter into a contract of partnership, it is unlawful according to all our doctors. The reason for this distinction, according to *Mohammed*, is that whatever is mixed, of one species, is *Zoodatal Imfal**; and whatever is mixed, of two different species, is *Zoodatal Keem*†: now as things of different species, when mixed together, are *Zoodatal-Keem*, ignorance exists with respect to them; (because, it is requisite that appraisers fix the value of them ‡,) and they are therefore incapable of constituting capital stock, in the same manner as any other goods or effects:—a partnership in them is consequently invalid; and such being the case, they become subject to the rules in admixture of property, as treated of under the head of *Decrees*, in the *Jama Sagbeer*, and which shall be fully set forth (in this work) when we treat of *deposits* §.

It cannot be contracted respecting heterogeneous stocks.

WHERE

* Things compensable by an equal quantity of their own species, (such as *wheat* for *wheat*, *barley* for *barley*, &c.)

† Things compensable only by an equivalent in *money*.

‡ Before the respective proportion of each partner, in the capital stock, can be ascertained.

§ The arguments throughout this and the preceding passages are so much involved in subtle distinction and perplexing casuistry, and are in many places so little capable of an intelligible translation, (from the impossibility of rendering clearly the *technical terms* which

Partnership
by right of
property is ef-
fected by
each partner
selling one
half of his
stock to the
other.

WHERE two persons are desirous of entering into a contract of partnership in goods and effects, each must sell one half of his own goods in lieu of one half of the goods of the other, so that a *Shirkat-Milk*, or partnership by right of property may be established between them; and then let them enter into partnership by compact.—(Our author remarks that in this instance a partnership in right of property is established, but that a partnership by reciprocity is not lawful, as goods and effects are incapable of constituting stock in such a partnership.) With respect to what is advanced above, that “each partner must sell one half of his own goods in lieu of one half of the goods of the other,”—it means, that each is thus to sell a moiety of his goods to the other, *provided the value of the goods of each be equal*. If, however, the value of the goods of each be *different*, it is requisite that he whose goods are of *least* value sell such a proportion as may suffice to establish a partnership; for instance, if the value of the goods of *one* be *four* hundred dirms, and that of those of the *other* be *one* hundred dirms, then let the *latter* sell *four-fifths* of his goods to the *former*, in lieu of *one-fifth* of *his* goods, so that the whole of the goods may be held in partnership between the parties, in five lots, or shares. With respect to what is advanced by our author, as above, that “a partnership in right of property is established, but a partnership by reciprocity is not lawful,” it is of no weight; for, rendering goods and effects capital stock in a contract of reciprocity is illegal, only, because this would induce a profit upon property concerning which there is no responsibility,—or, because the respective capital of each would be unknown at the time of division: but neither of these reasons exist in the case in question:—the *first* reason does not

which so frequently occur in them,) as greatly to obscure the matter. The principle upon which the whole turns is that “a partnership by reciprocity cannot be entered into with respect to any articles which are not *standards of value*,” and the question is, “what articles they are which may be considered as standards?”—which some of the doctors confine solely to *cash* in the precious metals: others extend it to *bullion*; and others, again, to copper coins [*salos* ;] whilst some include *grain*, contending that this is a standard of value, and may therefore be used to represent property, in the same manner as cash.

exist,

exist, because upon each selling a moiety of his estate to the other, the half of each partner, respectively, is a subject of responsibility to the other, with respect to its value, and hence the profit which accrues from the property of both is a profit from property which is a subject of responsibility: and the *second* reason does not exist evidently, because there is no occasion for specifying the respective capital of each partner at the time of division, so as to require the valuation of appraisers, thence inferring *ignorance* respecting it, because the property of both is *equal*, and they are both partners in that property, and consequently, whatever price the property may bring must necessarily be divided between them in equal shares.

SHIRKAT-AINÂN, or partnership in *traffic*, is contracted by each party respectively becoming the *agent* of the other, but not his *bail*. This species of partnership is where two persons become partners in any particular traffic, such as in *cloths* or *wheat*, (for instance)—or where they become partners in all manner of commerce indifferently. No mention, however, is to be made concerning *bail*, in their agreement, as bail is not a condition in a partnership of this nature:—but it is indispensably requisite that each act as *agent* on behalf of the other; since, without this, the design, (namely, partnership in property,) cannot be obtained; as acts done on behalf of another are performed either in virtue of some avowed authority, or of *agency*; and no *authority* existing, *agency* is constituted, in order that each may act for the other, so that the property may be held in partnership between them.

Description
of partner-
ship in *traffic*.

It does not
admit mutual
bail, but it
requires mu-
tual *agency*.

If the stock of one of these partners exceed that of the other, it is lawful, because there is occasion for this equality, (as shall be hereafter demonstrated,) and the terms in which such a partnership is contracted do not require *equality*.

It admits of
inequality in
point of stock:

IN

and also of a
dispropor-
tionate pro-
fit.

IN partnership in *traffic*, it is lawful that the stock of each partner be equal, and yet the profit unequally shared,—that is, that it be stipulated that the profit to *one* partner exceed the profit to the *other*. *Ziffer* and *Shafci* maintain that this is not lawful; for if, with equality of *stocks*, an inequality of *profit* be admitted, it induces a profit upon property concerning which there is no responsibility; because, if the capital appertain to the two in equal shares, and the profit be divided into three lots (for instance,) the sharer in the larger proportion of profit is entitled to a superior profit without any responsibility, since the responsibility is in proportion to the capital;—and also, because a partnership in the *profit* exists in virtue of partnership in the *capital*, (according to their tenets, whence they likewise hold the *admixture* of the property to be a condition;)—the profit upon the property, therefore, is the same as increase of living stock; and each is consequently entitled thereto, in proportion to his original right of property in the capital. The arguments of our doctors upon this point are twofold.—FIRST, the prophet has said “*The profit between them is according to their agreement, and their loss in proportion to the property of each respectively;*”—where no distinction is made between the *equality* or *inequality* of their properties.—SECONDLY, in the same manner as a person is entitled to profit in virtue of *property*, he is also entitled to it in virtue of *labour*, (as in a case of *Mozáribat*, for instance :) it may also sometimes happen that one of the partners is more skilful and expert in business than the other, and consequently, that he will not agree to the other sharing equally in the profit, whence it is requisite that one have a larger share than the other. It would be otherwise if the *whole* profit were restricted to *one* of the partners, because in this instance the contract is not a contract of *partnership*: neither is it a contract of *Mozáribat*; for if, in *Mozáribat*, the whole profit be assigned to the *manager*, it is a *loan*; or if to the *proprietor of the stock*, it is a *Bazdt*. With respect to what is objected by *Ziffer* and *Shafci*, that “if, with equality of stocks, an inequality of profit be admitted,

“ it induces a profit upon property concerning which there is
 “ no responsibility,”—we reply that a contract of partnership
 in *traffic* resembles a contract of *Mozáribat*, in this particular,
 that each party respectively manages with the stock of his part-
 ner; and it also resembles partnership by reciprocity, both with
 regard to its *name*, (as being a *partnership*,) and likewise with regard
 to the *conduct* of it, because both partners act in it. In consideration,
 therefore, of its resemblance to *Mozáribat*, we determine that it is
 lawful to stipulate a profit upon property concerning which there is
 no responsibility; and, in consideration of its resemblance to partner-
 ship by reciprocity, we determine that, if it be stipulated that both
 partners shall act alike*, yet the contract of partnership in actual
 stock is not invalidated.

It is lawful for either party, in partnership in *traffic*, to engage in
 the contract with respect to a *part* of his property only, and not the
whole, because an equality in point of stocks is not essential to it, since
 the term *Ainán* does not require it.

A person
 may engage
 a *part* only
 of his pro-
 perty in it.

PARTNERSHIP in traffic is not valid except in such property as is
 lawful in partnership by reciprocity.

The stock can
 only be such
 as is lawful
 in *reciprocal*
 partnership;
 but the re-
 spective stocks
 may be *hetero-*
geneous.

It is lawful for two men to engage in a partnership in *traffic*,
 where the stock of one party consists of *dirms*, and that of the other
 party of *deenárs*, or where on one side it consists of *white dirms*, and
 on the other of *black dirms*†. *Ziffer* and *Shafei* allege that this is
 illegal. This difference of opinion is founded on a difference of senti-
 ments respecting the admixture of stocks; for, according to those

* Although a greater share of the profit be conditioned to *one* of the partners.

† The translator has not been able to discover the difference between *black dirms* and
white dirms:—it is probably some *local* distinction, known in *Persia* and *Arabia*.

two doctors, a *coclescence* of the capital is essential to the partnership; and that cannot take place where the two stocks are *het-rogeneous*. This point will be more fully treated of hereafter.

Debts can only be claimed from the partner who incurs them;

and this partner, on making payment, has recourse to the other for his proportion.

WHERE one of two partners in *traffic* makes a purchase, the demand for the price lies against him, and not against the other partner; (because, as has been already demonstrated, the contract of partnership in question comprehends *agency*, but not *bail*; and the agent is the original with respect to rights *;) and on making payment, the purchaser is to take from the other partner his proportion of the price, (provided he has satisfied the demand out of his own particular property, and not out of the partnership stock,) because he is the other's agent with respect to his share. If, however, it be not *known* whether he has paid the price out of the partnership stock, or out of his own property, except from the declaration of the purchaser himself, it is in this case incumbent upon him to produce proof; because the purchaser here advances a claim for property against his partner; and the partner resists his claim: and the declaration of a defendant, (delivered upon oath,) is to be credited.

The contract is annulled by the loss of the whole capital; or of the stock of either partner in particular;

IF the whole partnership stock, or the stock of either partner in particular, perish before any purchase be made, the contract of partnership is annulled: because, in a contract of partnership, the *subject* of the contract is *property*, (that being specified in a contract of partnership, in the same manner as in a *deed of gift*, or a *will*,) and, in consequence of the destruction of the subject, the contract is dissolved, in the same manner as in *sale*. It is otherwise in *Mozáribat*, and *singular agency*†, because in those the *dirms* or *decnárs* cannot be identified by *specification*‡, or in any other mode than by *actual*

* That is, *he* is the person upon whom all demands are to be made.

† Arab. *Wakálit-Mosfradit*; meaning, agency with respect to some particular act.

‡ That is, by the mention of them in the contract.

seizin.

seizin. The agency herein mentioned is restricted to the *singular* description, for the purpose of distinguishing it from the agency implicated in a contract of partnership or of pawnage, because *that* is annulled by the dissolution of the partnership or the pawnage, as a thing which is *comprehended* is annulled by the dissolution of that which comprehended it. An example of *singular* agency is where a person commissions another to purchase him a *slave*, (for instance,) in which case, if he give the agent money for that purpose, and the money perish in the agent's hands, yet the agency is not annulled.—“It is otherwise” (says *Fakr-al-Islām* in his commentary on the *Zeeâdat*,) “in cases of *Moxdribat* and *partnership*, because the *dirms* and *deenârs* are in both identified by specification, inasmuch that if the money be lost before delivery, the *Moxdribat* is annulled.” This is contradictory to what our author has above advanced, that, “in *Moxdribat* and *singular* agency, the *dirms* and *deenârs* cannot be identified by specification, nor in any other way than by actual *seizin*.” It is, however, probable that there are *two* opinions recorded on this point. What is above said, that “if the *whole* partnership stock, or the stock of either partner in particular, perish before any purchases be made, the contract of partnership is annulled,”—is evident, where the whole stock of both partners perishes; and where the stock of *one* of the partners perishes the contract is also annulled; because the partner whose property has not perished had agreed to the other participating in *his* property for no other reason than that he should also participate in the *other's* property; but, upon this being rendered impossible, he will not agree that the other should participate in *his* property. The contract, therefore, is void, as its continuance is useless: and, to whomsoever the destroyed property belonged, the loss affects *him* only, and not the *other*, whether it perish in *his own* hands, or in the hands of his *partner*;—if in *his own* hands evidently; and also, if in the hands of his partner, because it is a *trust* in the hands of that person*.

and (in the last case) the loss falls entirely upon the partner to whom such stock had belonged,

* A trustee is not responsible for his trust in cases of *loss* or *destruction*. (See *Deposits*.)

unless it had perished after admixture.

It is otherwise, however, where the stock perishes after admixture; for in this case the loss falls upon the partnership stock generally, since, as the property of each is no longer distinguishable, it follows that the loss must affect *both*.

A purchase made by one partner, where the stock of the other afterwards perishes, is participated in by *both*; and the partnership continues in force, agreeably to the contract:

If one of the partners in question make a purchase with his own stock, and the stock of the other afterwards perish before he has made any purchase with it, in this case the thing purchased by the first partner is in partnership between the two, agreeably to stipulation; because, as partnership subsisted between them at the time of the purchase, the article purchased became a subject of partnership between them at that time; and the effect is not altered by the destruction of the other's property *after* the purchase. This partnership in the purchase is a *partnership by contract* * (according to *Mohammed*,) inasmuch that, whoever of the two sells it, the sale is lawful. *Hassan-Ibn-Zeeydd* alleges that the partnership is merely a partnership *by right of property* †, inasmuch that it is not lawful for either partner to sell more than his own share, because the contract of partnership was dissolved in the present instance, in consequence of the destruction of stock, in the same manner as where the destruction takes place before any purchase being made; nothing, therefore, remains, except the *effect* of the purchase, namely, *right of property* [in the thing purchased,] and hence it is a *partnership by right of property*. The argument of *Mohammed* is that the *contract* has been completely fulfilled with respect to the article purchased, and consequently cannot be rendered void by the destruction of property after such completion. It is to be observed that, in the case now under consideration, the purchaser is to take from his partner his proportion

* Meaning, that the partnership (with respect to the *purchase*) continues in force under the original contract.

† That is, existing merely in virtue of a *mutual right of property*, and not of the *contract*.

of the price [of the article purchased], because he bought a moiety of it by *agency*, and paid the price out of his own substance, as was before mentioned.—What is now advanced proceeds upon a supposition of the purchase made by one partner having been effected *before* the destruction of the other's stock. If, however, the stock of one partner first perish, and the other partner then make a purchase with his own substance, and it should have been expressly agreed, in the contract, that each is to act as an agent on behalf of the other, in this case whatever the purchaser may have bought is divided between the two, according to their previous stipulation; because, although the contract of partnership be annulled, yet the agency, which was expressly mentioned in it, continues in force; the purchase is therefore participated in by both, in virtue of the agency; the connexion continues a partnership *by right of property*; and the purchaser is accordingly to take from his partner his proportion of the price, for the reason before stated. If, on the other hand, the *partnership* only be mentioned in the contract, and nothing expressed in it respecting each partner acting as an *agent on the other's behalf*, the article purchased by one partner appertains solely to *him*; because, if the article were participated between the two, it could be so only in virtue of the mutual agency implicated in the contract; but, that being annulled, the power of agency implicated in it is also annulled. It is other wise where the parties have *expressly mentioned* a mutual power of agency; because in this case the agency is not annulled by the annulment of the partnership, as agency is here one especial design of the contract, and is not merely *implicated* in it.

but if it perish before the other's purchase, that continues between them under a partnership by right of property;

unless there be no mention of mutual agency in the contract; for in this case it belongs solely to the purchaser.

A PARTNERSHIP is legal, although the parties should not have mixed stocks. Ziffer and Shafci maintain that it is illegal, because the *profit* is a branch of the *stock*, and the branch is not to be participated in except where the original stock itself is also participated, which cannot be so but by *coalescence* or *admixture*. The ground upon which they proceed is that, in a contract of partnership, the *stock*

Partnership holds without admixture of stocks.

stock is the *subject* of the contract, (whence it is that the partnership is referred to the *stock*, by each partner saying to the other "I make you my partner in such stock,"—and also, that the specification of the *capital* is an essential,)—and, such being the case, it is indispensably requisite that the stock be *participated* in by both. It is otherwise in *Mozdribat*, as that is not *partnership*; since it implies nothing more than that, as the manager is to act for the proprietor of the stock, he is consequently entitled to a share in the profit, as *wages on account of his labour*, which is different from the case in question, where the profit is a *branch of the stock*, and not *wages for labour*. This is a grand leading principle with *Ziffer* and *Shafēi*, insomuch that (arguing upon this ground) they allege it to be indispensable, in a contract of partnership, that the stock of both partners be of the same species; for, if otherwise, (as where one is possessed of *dirms* and the other of *deenārs*,) they hold that the contract is invalid because of the capital not being participated in by both: and they also allege (upon the same principle) that *admixture* is an essential: and likewise, that it is unlawful to stipulate an excess of profit to either partner, where their stocks are equal, as the profit is a branch of the stock:—and also, that partnership in *arts** and *trades*† is illegal, as in those there is no stock, (as shall be hereafter explained.)—The arguments of our doctors upon this point are twofold.—FIRST, partnership in *profit* is referred to the *contract*, and not to the *stock*; because, as the contract is termed "a contract of partnership," it is indispensable that the *property* of the term *partnership* exist in it; and, such being the case, it follows that the admixture is not essential.—SECONDLY, as the *money* [of which the stock consists] is not specified, the profit is not derived from the *capital*, nor indeed from any thing else than the *transactions* [which are had with the stock;] because each party is a *principal*, with respect to *one* half of the stock, and an

* Arab. *Shirkat Takattal* (synonymous with *Shirkat Sinnai*.)

† Arab. *Shirkat Amnā'*

agent with respect to the *other* half; and, as it hence appears that partnership may be established, in point of *transaction*, without admixture of stocks, it follows that it may also be established in the thing which accrues from transaction, (namely, the *profit*,) without such admixture: and, as the contract of partnership thus becomes similar to a contract of *Moxdribat*, a similarity of species in the stocks, and an equality of profit, are not essentials, although the stock of each be equal. A partnership in arts is also lawful on the same principle.

A CONTRACT of partnership, which stipulates any particular sum out of the profit for one of the partners, is unlawful, as this condition is a means of destroying partnership, since it is possible that no more profit may be acquired altogether, than the sum so stipulated. Correspondent to this is a case of cultivation; that is to say, where the parties, in a compact of cultivation, stipulate a particular quantity of produce to one of them, (that is, to the cultivator or to the landlord,) the compact is invalid; because such a stipulation is a means of destroying partnership; and in cultivation it is essential that the produce of the land be equally participated between those persons.

Partnership does not admit a specification of profit in behalf of either partner.

EACH of the partners, in a contract either of reciprocal partnership or of partnership in actual stock, is at liberty to give his stock in the manner of a *Bazdt*; because it is customary so to do in contracts of partnership; and also, because either partner is at liberty to hire any person to work for the acquisition of profit; and as the acquisition of profit without any return is still less objectionable than *hiring* with the same view, he is consequently authorised to adopt the other mode *a fortiori*. In the same manner also, either of them is at liberty to lodge this capital as a deposit, as this is customary, and sometimes necessary, among merchants. Each of them is also at liberty to give his capital in the way of *Moxdribat*, because, as *Moxdribat* is subordinate to partnership either *by reciprocity* or in *traffic*, it follows that a contract of partnership comprehends *Moxdribat*. It is recorded from

Either partner may make over his stock, in the manner of a *Bazdt*;

or lodge it as a deposit;

or intrust it to the care of a manager, by *Moxdribat*.

Haneefa that a partner has not this in his power, because *Moxáribat* is also a mode of partnership. The former opinion; however, is according to the *Mabsoot*, and is the most approved, because *partnership* is not the design of a contract of *Moxáribat*, the only view in it being the acquisition of profit. It is therefore lawful to give the capital in the way of *Moxáribat*, in the same manner as it is lawful for the proprietor of the stock to hire a labourer with wages. It is lawful, indeed, in a *superior* degree, because, where the *Moxarib* manages, and no profit is acquired, there are no wages owing to him from the proprietor of the stock, whereas, in a case of hire, where the hired person manages the stock and no profit is acquired, wages are nevertheless due to him from the hirer. It is otherwise with respect to a contract of *partnership*, for neither party is at liberty to engage in such a contract with a third person, with regard to the capital, because a thing cannot be a dependant of a similar thing.

Either partner may also appoint an agent on his own behalf.

EITHER of two partners, *by reciprocity*, or *in traffic*, is at liberty to constitute a person his agent to transact for him, because the appointment of an agent for purchase and sale is a dependency of traffic; and contracts of partnership are formed for the purpose of traffic. It is otherwise with an agent for *purchase*, for he is not at liberty to constitute another person his agent, to make the purchase on his behalf, as the appointment of an agent for purchase is a particular contract, the end of which is the acquisition of some specified and existent article, and a thing cannot be the dependant of its similar.

Each partner holds the stock in the manner of a trust.

THE possession of each of two partners, *by reciprocity* or *in traffic*, over the partnership stock, is considered as the possession of a *trust*, since each possesses the property with consent of the proprietor, for this reason, that he is to give something in lieu of it, in the same manner as where a person takes possession of a thing with a view to purchase it; (not because it is a *pledge*, as in *pawnage*;) the stock is therefore a *deposit*.

SHIRKAT SINNÂI,

SHIRKAT SINNÂI, or partnership in *arts*, (which is also termed *Sbirkat Takabbal**) signifies where two *taylors*, or two *dyers*, (for instance) become partners, by agreeing to work and to share their earnings in partnership; which is lawful, according to our doctors. *Ziffer* and *Shaf'î* allege that this is unlawful; because the design of partnership is a participation of gain between the parties, and the partnership in question is not calculated to answer this end, since a capital is indispensable, as partnership in profit is founded on partnership in stock, (according to their tenets, as before set forth,) and in the case in question there is *no* capital. The argument of our doctors is that the design of the contract in question is *the acquisition of property*, which is attainable by each party constituting the other his agent; because upon each becoming agent on the part of the other with respect to *one* half, and a *principal* with respect to the *other* half, a partnership is established in the property to be acquired.—Unity of trade and of dwelling-place are not essentials in this species of partnership. *Mâlik* and *Ziffer* controvert this; for according to them unity of trade and of residence are essentials.

Description of partnership in *arts*.

It is not requisite that the parties both follow the same trade or reside in the same place.

OBJECTION. It was before mentioned that, according to *Ziffer*, partnership in *arts* is unlawful; but here it appears that he holds it to be lawful; which is a contradiction.

REPLY. There are two reports of the opinion of *Ziffer* upon this point. That before recited is conformable to one report; and what is now mentioned is according to another report.

—The argument of *Ziffer* in support of his latter opinion is that if the parties be of different trades (such as where a *dyer* and a *bleacher* become partners,) each will be at a loss with respect to the business undertaken by the other, as that is not his trade; the end of partnership, therefore cannot be obtained: in the same manner also, if their places of residence be different, each is at a loss with respect to the business of the other. The argument of our doctors is that the

* Literally "a partnership by mutual agreement."

It admits an
inequality of
profit.

cause of the legality of the partnership (namely, the acquisition of property) is in no way affected by unity of trade and place of residence, or the reverse:—it is not affected by unity of *trade*, or the reverse, because an appointment of agency made by agreement, with respect to any business, is approved, whether the person who undertakes it be able to execute it in a good and sufficient manner, or not at all, since the person who so agrees is not under any obligation to perform the business himself, but is at liberty to appoint any other person to perform it; and as each party has it in his power thus to appoint a person to perform the business in question, the contract is consequently valid: neither is it affected by unity of *place*, or the reverse, because, if one of the two partners work in *one* shop, and the other in *another* shop, yet it is evident that no difference whatever is thereby created in essential circumstances.—It is to be remarked that if, in the case now under consideration, the partners stipulate to perform equal labour, and to divide the acquisition arising from it in three lots*, the same is lawful, upon a favourable construction. Analogy would suggest that this is unlawful, because the responsibility is in proportion to the labour, whence, if this stipulation were admitted, it would induce a profit from a matter concerning which there is no responsibility: any excess to either party, therefore, is unlawful in the present instance, in the same manner as it is unlawful in a *Sbirkat Wadjoob*, or partnership *upon credit*,* (as shall be hereafter demonstrated.)—The reason for a more favourable construction is that what each of the partners takes he does not take in the manner of *profit*; as gain does not bear the denomination of *profit* except where the stock and the gain are of the same nature; but they are *not* of the same nature in the case in question, because the *capital*, in this instance, is *industry*, and the profit *substance*; the property so acquired, therefore, is not *profit*, but merely a *return for industry*: now industry is appreciable by means of estimation; and consequently, where

* Two lots for one partner, and one lot for the other.

both partners agree to receive a certain specific proportion, such proportion is an estimate of the industry of each respectively : the excess, therefore, is not unlawful with respect to him in whose behalf it is stipulated. It is otherwise in a partnership *upon credit*, because in that instance the gain is of the same species with the *capital*, (as both consist of *substance*;) and *profit* is established where the capital and the gain are of the same nature; and as profit on property concerning which there is no responsibility is unlawful, except in a contract of *Mozáribat*, it follows that it is unlawful in a contract of partnership *upon credit*: the case in question, therefore, is in no respect analogous to a case of partnership *upon credit*.

IN a partnership in *arts*, whatever work one partner agrees to is incumbent upon him, and also upon the other partner, inasmuch that the employer may require the performance of it from either; and each is entitled to demand payment from the employer for the business performed. Upon the employer, also, thus paying either, he is thereby discharged of all demands. This is evident where the partnership in arts is of a *reciprocal* nature, (by both partners being upon an equality with respect to those particulars in which equality is requisite in a contract of *reciprocity*;)—and where the partnership in question is not of a *reciprocal* nature, but in the manner of a partnership in *traffic*, the same is admitted, on a favourable construction, Analogy would suggest otherwise; because the partnership has been contracted in *general* terms, without any mention of *bail*; and *bail* is not one of the articles of a partnership in *traffic*: it would therefore follow that the employer is *not* empowered to require the performance of the business from either of them indifferently; and also, that they are not *both* empowered to require payment from the employer;—and likewise, that the employer is not discharged from all demands, by paying either indifferently. The reason for a more favourable construction is that the partnership is an occasion of responsibility; that is, in consequence of the partnership, the performance of work

The work agreed for by either partner is binding upon the other; and either is at liberty to call upon the employer for payment.

is incumbent upon the parties; whence any business engaged in by either is incumbent upon the other also; and the other is accordingly entitled to the payment, as one of them engaging to perform any work equally affects the other; for if the other also were not subject to this obligation, he would not be entitled to payment: the partnership in question, therefore, is equivalent to a partnership by *reciprocity*, with respect to the obligation of work, and the taking possession of the payment for it.

Description
of partner-
ship upon cre-
dit.

It may in-
clude recipro-
city.

SHIRKAT WADJOOH, or partnership *upon credit*, is where two persons, not being possessed of any property, become partners by agreeing to purchase goods jointly, upon their personal credit*, (without immediately paying the price) and to sell them on their joint account. This species of partnership is termed *Wadjoob*, for this reason, that no person can purchase articles upon credit but one possessed of personal notoriety [*Wijábit*] among mankind. It may lawfully constitute a *partnership by reciprocity*; because each partner may become both bail and agent for the other. Where, therefore, two persons, capable of bail, make a purchase of any article, on condition that it shall be held between them in equal shares; introducing the term "*by reciprocity*" into their agreement, it is a contract of reciprocity. If, on the other hand, they express their agreement merely in *general* terms, it is a *Shirkat Ainán*, or *partnership in traffic*, because when thus generally expressed, it is conducted in the manner of such a partnership. The legality of the partnership in question is according to our doctors. *Shafei* alleges that it is illegal. The arguments on both sides have been already recited.

Each partner
is agent for
the other.

In partnership upon credit, each partner is agent on behalf of the other, with respect to what he purchases;—because any act which affects another is unlawful, except it be performed in virtue either of

* Arab. *Wijábit*. Literally, *personal presence*, or *notoriety*.

agency or of authority* ; and as authority does not exist in the present instance, agency is certified.

If the partners agree that what they purchase shall be held between them in equal shares, and that the profit also shall be equally divided, it is lawful : but it is not lawful, in such a case, to stipulate an excess of profit to *one* of them. If, however, they agree that what they purchase shall be held between them in three lots, and that the profit also shall be divided into three lots †, it is lawful. In short, if the profit be in proportion to the right of property it is lawful, but otherwise not. The reason of this is that men are entitled to profit only on account of *stock, management, or responsibility* ; thus the proprietor of a stock is entitled to profit in virtue of the stock ; a manager in virtue of his management ; and a master artisan, who employs a scholar or apprentice at *half wages* or *third wages* (for instance) is entitled to the profit arising from his work in virtue of his responsibility for such work ;—(whence it is that if a person say to another “ Transact with your own stock on condition that the profit be “ mine,” it is unlawful, because in such a case, no one of the above particulars exists.) As men, therefore, are entitled to profit only on some one of these three principles, and as, in a partnership of credit, the title to profit is in virtue of responsibility (as aforesaid,)—and as, also, responsibility attaches in proportion to the right of property in the thing purchased,—it follows that whatever exceeds the proportion of such right of property is a profit upon a thing concerning which there is no responsibility. Now the stipulation of profit from a thing concerning which there is no responsibility is not valid except in a contract of *Mozáribat* ; and a partnership upon credit has not the property of a contract of *Mozáribat*. It is otherwise in a partnership

The profit of each partner must be in proportion to the share of each in the adventure.

* Arab. *Wilyyat*. Meaning the authority derived from natural or personal sight, such as that of a guardian or a proprietor.

† That is, two lots to one, and one lot to the other.

in traffic, as that has the property of a contract of *Mowáribat*, inasmuch as each partner *in traffic* transacts business with the stock of the other partner, in the same manner as a *manager* transacts with the stock of the *proprietor*, whence a partnership *in traffic* is, in effect, a *Mowáribat*.

SECTION.

Of INVALID PARTNERSHIPS.

Partnership
does not hold
in articles of
a neutral na-
ture,

PARTNERSHIP is not lawful in *wood*, *grafs*, or *game*. If, therefore, two persons enter into a contract of partnership with respect to such articles, and afterwards collect wood, or *grafs*, or kill game in hunting, the wood or *grafs* so collected, or the game so killed, by either of them, belongs to him solely, and not to the other partner. The same rule holds in cases where two persons enter into a contract of partnership with respect to any other articles of a *neutral* nature, (such as fruit collected from the trees of the forest, which are common property;) because a contract of partnership comprehends a commission of agency; and the appointment of an agent for procuring things of a *neutral* description is null, because the instructions of a constituent to this effect are invalid, since an appointment of agency signifies an endowing with authority to transact concerning a matter originally subject to the acts of the *constituent* only, and not of the *agent*; but it is otherwise in the case in question, as the agent is here at liberty himself to take the neutral article *without* the instruction of his constituent, and consequently is incapable of appearing as his *deputy* concerning it. In short, a right of property in a neutral article is established only by the acts of *taking* and putting it in *custody*: if, therefore, both partners take it *jointly*, it is equally in partnership

partnership between them, as they are both equally entitled to it:— but if *one* of them only exert himself in taking it, the other doing nothing, it belongs wholly to the one who acts: if, on the other hand, one be the *chief actor*, and the other only an *assistant*, (as where one *plucks* the fruit, and the other *collects* it,—or, where one both plucks and gathers it, and the other carries it away,) in this case the assistant is to receive *wages* in proportion to his labour.—This is according to *Mohammed*. (*Aboo Toosaf* alleges that this rule holds only where the wages do not exceed half the value of the article in question; but that, if the wages exceed this, one half of the *value* only is paid to the assistant, because, as he had agreed to accept one half of the article specified, his right fails with respect to any larger proportion.)

unless they be taken possession of jointly:

If one man possess a mule, and another a *Masback*, (or leather bucket, such as is used in drawing water,) and they enter into a contract of partnership in drawing water*, by agreeing that whatever may be acquired thereby shall be in partnership between them, such partnership is invalid, the whole acquisition going to the person who actually draws the water; and if this be the owner of the *mule*, he owes the other the adequate hire for the *bucket*; or, if it be the owner of the *bucket*, he owes the other an adequate hire for the *mule*. The reason of the partnership being invalid is that it is contracted with respect to an article of a *neutral* nature, (namely, *water*;) and is therefore unlawful. The hire of the mule or the bucket is due, because the neutral article (namely the *water*) becomes the property of the person who drew it; and as he derives an advantage, under an in-

nor in this instance, where the means of acquiring them are different.

* Water is in many parts of *Asia* procured from *draw-wells*, sunk to a considerable depth. From the edge of such wells a road is constructed or cut, going off from twenty to thirty yards, in an *inclined plain*; and over the well is erected a *frame* or *cross piece*, furnished with a pulley, through which a line runs, having suspended at one end a large leather bucket, [*Masback*;) the other end is fastened to traces, in which a mule, bullock, or other animal, moving to and fro' on the inclined road, by this means draws the water.

valid

valid contract, from the property of another person, (namely, from his *mule* or his *bucket*,) it follows that he owes a hire for the same.

The profit to each partner must be in proportion to the stock.

In all cases of invalid partnership, the profit is in proportion to the stock; any stipulation, therefore, of an excess of profit to either partner is null. Accordingly, if the stock be between the partners in *equal shares*, and they agree to their profit being in *three lots*, such agreement is null, and the profit must be equally divided; because, as the profit which accrues is a dependant of the stock, the *degree* of it must be in proportion to the stock, in the same manner as, in a contract of cultivation, the grain which is reaped is a dependant of the *seed*. The reason of this is that a claim to an excess profit can exist only in virtue of a previous specific agreement: but in the case in question this agreement has become invalid in consequence of the invalidity of the contract of partnership *itself*: the claim, therefore, remains in force only in proportion to the capital stock.

A contract of partnership is annulled by the death or apostacy of either partner;

whether the survivor be aware of that event or not.

If one of two partners die, or apostatize, and be united to a foreign country*, the contract of partnership is annulled;—because a contract of partnership comprehends an appointment of agency, which is essential to the existence of partnership, for the reasons already assigned: now *agency* is annulled by *death*; and it is also annulled by the circumstance of desertion to a foreign country during apostacy, where the *Kâzee* issues a decree in consequence of such desertion, because that is equivalent to death,—as has been already shewn in treating of *apostates*: upon the *agency*, therefore, being annulled, the contract of partnership is also annulled. It is also to be observed that the surviving partner being aware of the decease of his fellow, or otherwise, makes no difference whatever with respect to the dissolution of the partnership; because as, in the case in question, the

* That is, be expatriated by a decree of the *Kâzee*, issued in consequence of his apostacy and desertion. (See *Institutes*, p. 229.)

survivor

survivor is virtually discharged from the agency by the decease of his partner, it is not essential that he be informed of that event. It is otherwise where one of two partners *breaks* the contract of partnership, for the effect of such a breach depends upon the knowledge of the other partner, as the *breach* is a designed *dissolution of the contract*.

SECTION.

It is not lawful for either partner to pay the *Zakât* upon the other's property without his permission, as the payment of *Zakât* is not a branch of traffic.

A person cannot pay *Zakât* upon his partner's property without his permission.

If each of the partners give a general permission to the other to pay the *Zakât* upon his property, and each should afterwards first pay the *Zakât* upon his own particular share in the stock, and then pay *Zakât* upon his partner's share, in this case he who *last* paid the *Zakât* is responsible, whether he be aware of the other having already paid it or not. This is according to *Haneefa*. The two disciples allege that he is not responsible, where he is not aware of that circumstance. What is here advanced proceeds upon a supposition of each partner having paid the *Zakât* upon their respective shares of stock *successively*, and not all together; for where they have paid it all together, each is responsible for the other's proportion of it. A correspondent difference of opinion obtains where any indifferent person directs another to pay the *Zakât* upon his property, and the other accordingly pays the *Zakât* upon his property after the person who so directed him had already paid it; for, according to *Haneefa*, the person acting under such direction is responsible, whether he pay the *Zakât* with a knowledge of the above circumstance, or otherwise. The two disciples, on the other hand, maintain that he is not responsible

Case of mutual permission to pay *Zakât*.

unless he pay it, having a knowledge of that circumstance, as he has acted by direction, and consequently cannot be held answerable. They admit, indeed, that it may be objected that what the person acting under such direction pays is not *Zakât**, and consequently he ought to be responsible:—but to this they reply that the order which the person in question received was not in fact an order *to pay so much ZAKÂT*, but rather, merely, an order *to transfer so much to the poor*, since the payment of actual *Zakât* is not within his province, as this is connected with the intention of the principal, and no more can be required of the person so directed than what is within his province and ability:—the person in question, therefore, stands in the same predicament with one who is directed to perform sacrifice on behalf of another, in a case of detention; thus, if a person engaged in the ceremonies of pilgrimage were to fall into the hands of an enemy, and to direct any other person to perform sacrifice at the temple on his behalf, and the other perform sacrifice accordingly, after the principal had been released from the enemy, and had completed his pilgrimage, yet he does not bear the loss†, whether he be aware of the detention having ceased, or otherwise. The argument of *Haneefa* is that the person in question has been directed “*to pay ZAKÂT*,” and as what he pays is not in fact *Zakât*, it is evident he has acted contrary to the orders of his principal, whose design in giving such orders was to discharge himself from an obligation incumbent upon him; (for it is evident that his sole view in subjecting himself to such an expence is to ward off the divine anger attending the neglect of *Zakât*;)—now, as (in the case in question) this design has been fully answered by the payment of the *principal himself*, it can no longer be so by the pay-

* Because *Zakât* has been already paid by the *principal*, and hence what this person pays is not properly *Zakât*, but rather *gratuity* or *alms-gift*.

† That is to say, the expence attending the sacrifice, (although it be insufficient and nugatory under such a circumstance,) nevertheless falls upon the *director*, not upon the *person directed*.

ment of his *substitute*, and hence it follows that the substitute is discharged from his commission, whether he be aware or not, because this is a *virtual* discharge, and to that knowledge is not essential. With respect to the case of sacrifice under a circumstance of *detention*, as adduced by the two disciples, some in reply to it allege that the principle there advanced is not generally admitted, as concerning *that* also there is a difference of opinion. Others, again, maintain that there is an essential difference between that case, and the case under consideration. The reason they give for this difference is, that sacrifice is not *incumbent* upon the detained person, as he is permitted to delay it until his detention shall cease. The payment of *Zakât*, on the other hand, is *incumbent*, whence the design in appointing an agent to pay it is *to discharge an obligation*; and as this design is not fulfilled*, it follows that the agent has no credit for his payment, and that what he pays is a waste and destruction of the property of his principal, for which he is consequently responsible. The case of sacrifice under a circumstance of detention, therefore, is not analogous to the case now under consideration, as sacrifice in such a circumstance is merely *lawful* but not *incumbent*, and hence the sacrifice performed by the delegate is not to be regarded as a waste and destruction of the property of his principal, for which reason he is not responsible.

If one of two partners by reciprocity permit the other partner to purchase a female slave with the partnership stock, and to have carnal connexion with her, and the other act accordingly, in this case the slave appertains to the purchaser, and he is not responsible for any thing. This is according to *Haneefa*. The two disciples allege that the other partner is entitled to take half the price of the slave; because the purchaser has paid for the slave out of the partnership stock, and consequently his partner has a right to be repaid his share in the

A female slave, purchased under a contract of reciprocity, becomes the property of that partner who, with permission of the other, has carnal connexion with her.

* As it has been already fulfilled by the payment of the *principal himself*.

same manner as in the purchase of *vituals* or *clothing*;—(that is, as, where one of two partners by reciprocity purchases vituals or clothing, paying the price out of the partnership stock, the other partner is entitled to take half the price from the purchaser, so also in the case in question.) The ground upon which this proceeds is that the slave in question has become the sole and exclusive property of the purchaser because of the necessity of legalizing generation; and as the *price* is due in proportion to the *rights of property*, it follows that the price of the slave is solely and exclusively due from the *purchaser*. The argument of *Haneefa* is that the slave has fallen into the possession of *both* partners, *a certiori*, according to what partnership requires, (for they cannot alter the requisites of partnership;) the slave, therefore, is the property of *both*, in the same manner as if no permission had been given: now the *permission* implies that the person who grants it makes a *gift* of his share to the purchaser; for carnal connexion is lawful only in virtue of *rights of property*; and there is no mode of establishing that in the present case but by *gift*; because *sale* cannot be supposed on this occasion *, as the establishment of a right of property by *sale* would be repugnant to the requisites of a contract of partnership; for if the partner were to *sell* his share to the purchaser, still *that* share is in partnership between the two, and does not belong exclusively to the purchaser. His share, therefore, is made the property of the purchaser by *gift* implied in the permission granted to the purchaser to have carnal connexion with the slave. It is otherwise with respect to *vituals* and *clothing*, because as these are excepted from the contract of *necessity*, they are the sole property of the purchaser in virtue of the spirit of a contract of purchase and sale; he, therefore, must pay half the price thereof to his partner, because he has discharged a debt due from *himself* [for the above articles] out of the partnership stock, whereas, in the case under consideration the purchaser discharged a *partnership* debt, which was

* Meaning a *complete* sale from one partner to the other.

equally due from *both* partners, for the reasons already alleged.—

It is to be observed that, in the case in question, the seller of the slave is at liberty to take the price from either partner, according to all our doctors, because this price is a debt incurred by an act of traffic. A contract of reciprocity, moreover, comprehends bail; and hence the price of the *slave* resembles (in this respect) the price of *viſtuals* or *clothing*.

but the ſeller
may take the
price from
either.



H E D A R A.

B O O K XV.

Of WAKF, or APPROPRIATIONS*.

Definition of
Wakf, and
various opi-
nions respect-
ing it.

WAKF, in its primitive sense, means *detention*. In the language of the LAW, (according to *Haneefa*,) it signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall still continue, and the advantage of it go to some charitable purpose, in the manner of a *loan*. Some give it as the opinion of *Haneefa* that, as the *advantage* of a thing is a nonentity, and as the alms-gift of a nonentity is invalid, it follows that *appropriation* is utterly illegal †. It is, moreover, recorded in the *Mabsoot* that *Haneefa* held appropriation to be invalid. The most approved authorities, however, declare it to be valid according to him; but since (like a *loan*) it is not of an *absolute* nature ‡, the appropri-

* Meaning always of a pious or charitable nature.

† That is, has no force in law.

‡ That is, it is not IRREVOCABLE.

ator is held to be at liberty to resume it, and the sale or gift of it is consequently lawful. According to the two disciples, *Wakf* signifies the appropriation of a particular article, in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a *property of God* by the advantage of it resulting to his creatures.—The two disciples, therefore, hold appropriation to be absolute; and, consequently, that it cannot be resumed, or disposed of by gift or sale; and that inheritance also does not obtain with respect to it. (There is, indeed, one point upon which the disciples differ in opinion: for, according to *Abou Yoozaf*, the appropriation is absolute from the instant of its execution; whereas *Mohammed* holds it to become absolute only on the delivery of it to a *Mootwalee*, or procurator*;—as will hereafter appear.) Thus the term *Wakf*, in its literal sense, comprehends all that is mentioned both by *Haneefa* and by the two disciples. Now, such being the case, no preference can be given to the tenets of one party over that of the other, as drawn from the *meaning of the term*; this preference, therefore, must be given as drawn from *arguments*. The arguments of the two disciples upon this subject are twofold: FIRST, when *Omar* was desirous of bestowing in charity the lands of *Simâg*, the prophet said to him “*You must bestow the ACTUAL LAND ITSELF, in order that it may not remain liable to be either SOLD or BESTOWED, and that INHERITANCE may not hold in it*”—SECONDLY, there is a necessity for the appropriation being *absolute*, in order that the *merit* of it may result for ever to the appropriator; and this necessity is to be answered only by the appropriator relinquishing his right in what he appropriates, and dedicating it solely to God; which dedication, as being agreeable to the LAW, in the same manner as that of a mosque, must therefore be made in the same mode. The arguments of *Haneefa* concerning it are

* Literally, a person endowed with authority; the term *procurator* is adopted by the translator, as being peculiar to the management of a religious foundation, and as distinguishing this office from that of a common agent.

various. FIRST, the prophet has said “ *Property cannot, after the decease of the proprietor, be detained from division among his heirs;*”—(in other words, *appropriations are not ABSOLUTE, but INHERITABLE.*) *Sbirrab* moreover says “ the prophet determined the sale of an appropriation to be lawful,”—which is as much as to say that “ before the promulgation of the LAW by the holy *Mohammed*, (on whom be the blessing and peace of GOD) appropriations were absolute; but our LAW has rendered them otherwise.”—SECONDLY, the appropriator’s right in the article appropriated must still continue in force, for this reason, that it is lawful for the creatures of GOD to derive an advantage from it, either by tillage (if it consist of *land*;) or by *residence*, (if it consist of *dwelling-houses*;) for if no one had any right in it, any acts with respect to it would be unlawful, in the same manner as with respect to a *mosque*. It is, therefore, evident that a right of property in it still continues: and it is also evident that this right of property must rest with the *appropriator*, and not with any *other* person, as he alone is entitled to expend the revenue arising from it upon the objects of the appropriation, and to appoint a procurator over it: but yet, as the term *Wakf* implies *giving in charity*, the use of it resembles that of a *loan*. THIRDLY, the appropriator wishes to apply the revenue arising from what he appropriates to some charitable purpose in *perpetuity*, which is impossible, unless his right of property in it continue. FOURTHLY, it is impossible that the appropriator’s right of property in the *Wakf* should be extinguished, during its existence, without its becoming the property of some other person, as the LAW does not admit the idea of a thing, during its existence, going out of the possession of *one* proprietor without falling into the possession of *another* proprietor. *Wakf*, therefore, in this particular resembles a *Sayeeba*. (A *Sayeeba* is a female camel, set at liberty in pursuance of a vow, (as where a man says “ if I return home from this journey,” or, “ recover from this disorder a certain female camel of mine is *Sayeeba* *,)

* Literally, *running about at liberty*. It may be used towards a female slave as a *formula of manumission*,

which

which the owner prohibits himself from any further use of; in the same manner as a *Babeera*, or female camel, which, after producing ten colts, it was customary, in times of ignorance, then to set at liberty, rendering it unlawful to be used or eaten.) Appropriation, in short, resembles the Pagan act of setting a camel at liberty, in this respect, that the thing appropriated does not go out of the right of property of the proprietor:—in other words, if a man constitute his quadruped a *Sayeeba*, still it continues his property; and so also, if a person appropriate his lands or quadruped. It is otherwise in a case of *manumission*, as that is a *dereliction* of property. It is otherwise also in the case of a *mosque*, as that is dedicated purely to God, (whence it is unlawful to derive any *advantage* from a mosque,) whereas, in a case of appropriation, the right of the *individual* still continues in force, and that, consequently is not dedicated purely to God.

It is reported by *Kadooree*, from *Haneefa*, that the appropriator's right of property is not extinguished, except where the magistrate so decrees, or where the appropriator himself suspends it upon his decease, by declaring "When I die, this house is appropriated to such a purpose," (and so forth.) *Aboo Yoosaf* alleges that his right of property is extinguished upon the instant of his saying "I have appropriated;"—(and such also is the opinion of *Sbafei*;) because that is a dereliction of property, in the same manner as *manumission*. *Mohammed* says that it is not extinguished until he appoint a procurator, and deliver it over to him: and decrees are passed upon this principle. The reason of this is that the right of God cannot be established in an appropriated article but by implication, in the consignment of it to his creature; (as a transfer to the Almighty, who is himself the proprietor of all things, although it cannot be effected *actually* and *expressly*, yet may be so *dependantly*;)—it therefore becomes subject to the rules of divine property *dependantly*, and consequently resembles *Zakát* and alms-gift. With respect to what is reported from *Haneefa*, that "the appropriator's right of property is

Alienation of the article appropriated is completed by a decree of the magistrate, and the declaration of the appropriator,

or the consignment of it to a procurator.

“extinguished by a decree of the magistrate,”—our author remarks that this is approved doctrine, as such a decree removes all difference of opinion. With respect, however, to what is further reported from him, that “the appropriator’s right of property is extinguished in consequence of his suspending that upon his decease,” it is altogether unfounded, as his right of property cannot be extinguished but by his bestowing the use of the article for charitable purposes *in perpetuity*, in which case it is the same as a bequest of perpetual usufruct:—in this instance, therefore, his right of property becomes extinct, and the appropriation is absolute. It is related, in the *Fatáwee Káree Khán*, that judicial decrees are issued on the subject of appropriations only in cases where a person having appropriated a particular article, and delivered it over to a *Mootwalee* or procurator, is afterwards desirous of resuming it; and the latter disputes the resumption, on the plea of the appropriation being absolute; and they carry the matter before a *Káree*, who decrees it to be absolute.—Concerning a case where the parties authorise any third person to decide upon this point, and he decides the appropriation to be absolute, there is a difference of opinion: it is certain, however, that such a decision is not binding upon the parties.

A decree of the magistrate fixes an appropriation:

but the decision of a referee does not fix it.

Case of an appropriation made upon a death bed.

IF a person make an appropriation upon his death-bed, *Tebáwee* reports that, according to *Haneefa*, it stands in the same predicament with a bequest after death,—(that is to say, is *absolute*;) contrary to an appropriation made during *health*, which is held by *Haneefa* not to be of an *absolute* nature. The true statement, however, is that the appropriation in question is *not* absolute, according to *Haneefa*; but it is *absolute*, according to the *two disciples*; with this distinction, however, that the appropriation here treated of is regarded as from the *third* of the appropriator’s estate, whereas an appropriation made during health is regarded as from the *whole* of the appropriator’s property.

UPON

UPON an appropriation becoming valid, (that is, *absolute*, according to the various opinions of our doctors, as here stated,—according to *Haneefa*, in consequence of the appropriator's declaration, and the magistrate's subsequent decree,—and according to *Aboo Yoosaf*, by his simple declaration,—and according to *Mohammed*, by his declaration and delivery to a procurator,)—it passes out of the possession of the appropriator; but yet it does not become the property of any other person; because, if this were the case, it would follow that it is not in a state of *detention*, but may be sold in the same manner as other property; and also, because if the person or persons to whom it is assigned were to become the *proprietor* of it, it would follow that it could not afterwards pass out of his possession in consequence of any condition stipulated by the former proprietor,—whereas it is *not* so, for if a person were to appropriate a *dwelling-house* (for instance) to the *poor* of a particular tribe, and the poverty of any one of these were afterwards removed, the right in it passes to the others, which it could not do if this person were a *proprietor*.

The appropriator's right of property is destroyed; but without a transfer of that right to any other person.

THE appropriation of an undefined part or portion of any thing* is lawful, according to *Aboo Yoosaf*. *Mohammed* alleges that an appropriation of this nature is unlawful; because, as *actual possession* is held by him to be an essential, (by the procurator taking possession of the article appropriated,) so, in the same manner that without which possession cannot take place is also an essential, namely *division*; and this can only be in a thing capable of division. (With respect, however, to a thing incapable of division, the appropriation of an indefinite portion of it is held to be legal by *Mohammed* also, as he conceives an analogy between this and a *gift*, or *charitable donation*.) The ground upon which the opinion of *Aboo Yoosaf*, proceeds is, that the separation of an indefinite part of any thing is indispensable to the taking possession of it; but as the *taking possession* is not (according to him) essential in

Any undefined part of a thing may be appropriated.

* Such as the *half*, or the *fourth*, of a *field*, *house*, &c.

a case of appropriation, (whence the *means* of taking possession is also unessential,) it follows that the appropriation of an indefinite part of any thing is held by him to be lawful. From this rule, however, he excepts a *mosque*, or *burying-ground*, the appropriation of any undefined portion of which is unlawful, although it be of an indivisible nature; because the continuance of a participation in any thing is repugnant to its becoming the exclusive right of God; and also, because the present discussion supposes the place in question to be incapable of division, as being narrow and confined, whence it cannot be divided but by an alternate application of it to different purposes, such as its being applied one year to the interment of the dead, and the next year to tillage, or, at one time to prayer, and at another time to the keeping of horses, which would be singularly abominable. It is otherwise with regard to the appropriation of any thing else than a *mosque* or *burying-ground*; because the appropriation of an undefined portion of any other matter, where it is of an *indivisible* nature, is decreed to be lawful by all our doctors, as it may be *hired*, (for instance,) and the parties may divide the rent.

Case of appropriation of land, where an indefinite portion of it afterwards appears to be the property of another person.

If a person appropriate land*, and it should afterwards appear that an indefinite portion of the land (such as a *fourth*) was the property of another person, the appropriation is void with respect to the remainder also, according to *Mohammed*; because, in this instance, the separation into *indefinite divisions* is associated with the appropriation, which is consequently invalid, in the same manner as a gift. It is otherwise where a donor resumes a part of his gift; or where the *heirs* of a donor who had made the gift upon his death-bed resume *two thirds* of his gift after his decease: for if a person, upon his death-bed, make a gift or appropriation of the whole of his pro-

* Arab. *zimm*; meaning any immoveable property whatever, whether *lands* or *tenements*. *Zimcen* is the term in the *Persian* version, and the translator therefore renders it *land* throughout.

perty, and the heirs resume two thirds, still the gift or appropriation are not rendered void, because, in this instance, the separation into indefinite divisions is *supervient*, and not *associated*; that is, at the time of the gift or appropriation the article was not divided into undefined portions, but became so afterwards. If, however, it should appear that another is entitled to a portion of the land, of a *specific* and not an *undefined* nature in this case the appropriation is not void with respect to the remainder, because of no indefinite division existing in this instance: and gifts and charitable donations are also subject to the same analogy.

AN appropriation is not complete, according to *Haneefa* and *Mohammed*, unless the appropriator destine its ultimate application to objects not liable to become extinct; as where, for instance, a man destines its application ultimately to the use of the *poor*, (by saying "I appropriate this to such a person, and after him to the *poor*,")—because these never become extinct. *Abou Yoozaf* maintains that where the appropriator names an object liable to termination (as if he were to say "I have appropriated this to *Zeyd*,") it is valid, and after the death of *Zeyd* it passes, as an appropriation, to the poor, although the appropriator had not named them. The argument of *Haneefa* and *Mohammed* upon this point is that appropriation requires an *extinction* of right of property, without a *transfer* of it; and as this, like manumission, is of a perpetual nature, it follows that if a thing be appropriated to a finite object, the appropriation is imperfect; whence it is that an appropriation is rendered void by making it *temporary*, in the same manner as a *sale* is made void by limiting its duration.

The objects of an appropriation must be of a perpetual nature.

OBJECTION.—This argument of *Haneefa*, that the right of property becomes extinct without "a transfer of it," contradicts what was formerly said, that, "according to *Haneefa*, in appropriation the "right of property is not extinguished."

REPLY.—There are two reports from *Haneefa* upon this subject. One of them is that which was before stated. Another makes the opinion

opinion of *Haneefa* to agree with that of *Mohammed*. Some also allege, in reply to this objection, that what is here advanced from him proceeds upon a supposition of the magistrate having decreed the appropriation to be *absolute*, under which circumstance it passes out of the possession of the appropriator according to all our doctors.

—The argument of *Abou Yoosaf* is that the design of the appropriator is to perform an act of piety acceptable to God; and this is fully answered in either case; because piety on some occasions may consist in the appropriation of an article to a *terminable* object,—and it may at other times consist in the appropriation of a thing to an *interminable* object;—the appropriation, therefore, is equally valid in both instances. Now some say that *perpetuity* is essential to it. *Abou Yoosaf*, however, does not consider the mention of perpetuity as an essential, as the terms *appropriation* or *charity* do clearly argue thus much, according to what was before advanced, that “Appropriation, like manumission, signifies an *extinction* of a right of property without a “*transfer* of that right.” According to *Mohammed*, on the other hand, the mention of perpetuity is an essential; because appropriation is a charitable donation of the use of a thing, or of actual product; and as those are sometimes temporary and sometimes perpetual, the general mention of it cannot be understood as a perpetuation: it is therefore indispensable that perpetuity be expressly mentioned.

Appropriation of *immoveable*, and of *moveable* property.

THE appropriation of *land* is lawful; because several of the prophet's companions appropriated their lands: but the appropriation of *moveable* property is altogether unlawful, whether purposely, or as a dependant. This is the opinion of *Haneefa*. *Abou Yoosaf* alleges that if a person appropriate lands, together with the cattle and slaves attached to them, it is lawful; and the same of all instruments of husbandry; because those are all dependants of the soil in the fulfilment of the design; the appropriation of these, therefore, as dependants of the land, is lawful; for many things are admissible *dependantly*, which are not so *positively*; thus the sale of *wine* (for instance) *by itself*

self is unlawful, whereas, *along with land* it is lawful,—and in the same manner the appropriation of the beam of a house is unlawful, whereas *along with* the house it is clearly legal. The opinion of *Mohammed*, also, accords with that of *Abou Yoozaf* in this point, because as he holds the appropriation of moveables to be lawful merely in virtue of the appropriator's declaration, it follows that he admits the appropriation of them *as a dependant* to be legal *a fortiori*. *Mohammed* is also of opinion that if a person appropriate *horses, camels, or arms*, to carry on war against infidels, it is lawful;—in which opinion, (as lawyers report,) *Abou Yoozaf* coincides with him. This proceeds upon a favourable construction; for analogy would suggest that such an appropriation is unlawful, for the reasons already alleged. The reason for a more favourable construction, however, is that the prophet once said “*KHĀLID has appropriated his HORSE and ARMOUR in the way of GOD;—and TELLIHA has appropriated his HORSE in the way of GOD* *.”—According to *Mohammed*, the appropriation is lawful of all moveables, the appropriation of which is commonly practised, such as *spades, shovels, axes, saws, planks, coffins* (and their appendages) *stone or brazen vessels*, and *books*: but according to *Abou Yoozaf* it is unlawful; because analogy cannot be abandoned but on the express authority of the sacred writings; and as *horses and armour* only are there mentioned, the admission must be restricted accordingly. *Mohammed* says that analogy may be abandoned on account of *utility*, (as in *arts or manufactures*, for instance;) and utility exists in the articles in question. It is, moreover, recorded of *Nasseer Ibn Yabee* that he appropriated his books, as conceiving that to be analogous to the appropriation of a KORAN: (in other words, as the appropriation of a KORAN is lawful, so also is the appropriation of any other book :) and this is approved, because other books as well as KORANS are kept for the purpose of reading and instruction. Most lawyers have passed decrees according to the opinion of *Mohammed* in this particular. It is written in the *Fatwee-Khaze-Khān* that there is a difference of opi-

* That is, in waging war against the infidels.

nion between the *Elders* concerning the appropriation of books.—*Fikkea-Abou-al-Seyb*, however, holds it to be lawful; and decrees pass accordingly.

The appropriation of articles in which it is not customary is unlawful.

It is not lawful to appropriate moveables, the appropriation of which is unusual or uncommon, according to our doctors. *Shaf'ei* alleges that the appropriation is lawful of every thing which admits of the use without a destruction of the subject, or of every thing lawfully saleable, because such articles as admit usufruct resemble *land*, *horses*, or *arms*. The argument of our doctors is that appropriation requires *perpetuity*, according to what has been already stated; and this cannot exist in *moveables*, since these are not of a lasting nature: analogy therefore suggests that the appropriation of moveables *in general* is unlawful:—it is admitted, however, in some articles, (although contrary to analogy,) because of the traditions already recorded,—and in other articles (such as *axes*, *saws*, and so forth,) because of *utility*: but the appropriation of furniture, clothes, and slaves, is unlawful, as being contrary to the suggestions of analogy, because they have neither tradition nor utility to support the legality, and therefore resemble *dirms* and *deenars*. With respect to what *Shaf'ei* has advanced that “those articles are analogous to *lands*, *horses*, and *armour*,” we reply that no analogy can be admitted between them; because land endures perpetually; and horses and armour are instruments of war against infidels, which is among the highest religious obligations, whence the property of *piety* exists in the appropriation of these articles in a much stronger degree than in the appropriation of other moveables;—the analogy, therefore, is not allowed.

An appropriation cannot be *fold* or *transferred*;

UPON an appropriation becoming valid and absolute, the sale or transfer of the thing appropriated is unlawful, according to all lawyers: the *transfer* is unlawful, because of a saying of the prophet, “*Bestow the ACTUAL LAND ITSELF in charity, in such a manner that it shall no longer be saleable nor inheritable*. An appropriation, therefore,

fore, is incapable of sale or transfer, upon becoming valid and absolute. If, however, the appropriation consist of an undefined part of any thing, and (in conformity with the doctrine of *Abou Roosaf*) become absolute, and the partner require it to be divided off, such division is lawful; because *division* implies *separation* and *distinction*. In all things, indeed, except those which are computable by weight or measure, *exchange* chiefly prevails: in *appropriation*, however, a superior regard is had to separation and distinction, in order that the appropriation may be valid: the dividing it off, therefore, is not to be regarded in the light of a sale or transfer, and is consequently legal.

but it may be divided off, where it consists of an undefined part of any thing.

If a person appropriate his share in partnership lands, he must divide it off and detach it from those of his partner; because he alone has authority to do this during his life, or his executor, after his decease. If, on the other hand, a person appropriate the *half* (for instance) of his *own* land, in this case the *Kāzee* is to divide it off, and alienate it from the appropriator:—(or the appropriator may sell one half (for instance) of his land to any other person, and then divide off the portion appropriated and alienate it from that person, and afterwards repurchase the remainder from the purchaser* :)—for the appropriator is not at liberty himself to divide off the portion of land which he has appropriated, or to separate it from that portion which he has *not* appropriated, because *one* person is incapable of *himself* making a division and thus giving *to himself*, since division can take place only between *two*.

If, in dividing off appropriated land, any *balance* occurs, (as where a person appropriates his share in partnership land, and he and his partner accordingly make a division of the land, and the share of one of them proves defective, and the other makes up the difference by a payment in money,) it is unlawful, where this balance is paid to the

In case of dividing it off, the payment of a balance made by the appropriator is lawful; but if made to the

* This is merely a *device*, for the purpose of obviating legal objections.

appropriator,
it invalidates
the appropri-
ation.

appropriator, as the sale of an appropriated article is unlawful: but if it is the *appropriator* who pays the balance, it is lawful, and what he gets in return is his property;—if, therefore, he be desirous of having it divided off from the part he has appropriated, he must refer the matter to the *Kdsee*, in order that he may separate the portion appropriated from what he [the appropriator] gets in return for the balance.

The income
of an appro-
priation must
be expended
(in the *first*
instance)
upon keeping
it in repair;

It is incumbent that the income of an appropriation be in the first instance expended in the repairs* of it, whether the appropriator may have stipulated this or not; because his design was that the income should serve as a perpetual fund; and as a perpetual income cannot be drawn from the article appropriated unless it be preserved in continual repair, that is a necessary attendant upon it; and also, because all acquisition must be attended with expence,—(in other words, he who enjoys the profit must also bear the loss.)—In short, upon the person to whom the advantage of a thing accrues must rest the inconveniencies attending it; and such being the case, it follows that the repair of an appropriation resembles the subsistence of a slave whose service has been bequeathed to any one, for the subsistence of such slave rests upon the legatee of usufruct. If, therefore, the appropriation be to the *poor*, and the requisition of repairs from them be impossible, (because of the appropriation itself being their sole dependence,) the repairs must be afforded out of the income arising from it. If, however, the appropriation be to some particular person, in the first instance, and after him to the poor, the repairs are in this case due out of that person's property, (but he is at liberty to furnish the means out of whatever part of his property he chooses,) during his life; and in this case no part of the income is laid out in repairs, be-

unless the ap-
propriatee be
rich, in which
case he is an-
swerable for
the repairs;

* Arab. *Tameer*: meaning, *the rendering a place habitable, by cultivation, if it be land, or by rebuilding, &c. if it be houses.*

cause the requisition from the person who enjoys the benefit is in such instance possible, since he is specified and known. It is to be understood, however, that the repairs are to be made out of the property, only in such a degree as may be requisite to preserve it in the state in which it was appropriated: if, also, it fall to ruin [or *run waste*] it is to be restored to the state in which it was appropriated, because the income of it was made over to others, and was to be derived from it *as in THAT state*, and not *as in any superior state*; and as such income is the right of him to whose use it is appropriated, it is not lawful, without his permission, to expend it in repairs to a degree beyond the original state of the appropriation. Some are also of opinion that the same rule obtains where the appropriation is to the *poor at large*, and not to any *particular individual*,—that is to say, the income is not to be expended in repairs beyond the original state of the appropriation. Others allege that this is lawful. The former, however, is the better opinion; because the income arising from an appropriation is expended in the repairs of it only from the necessity of preserving it as it was originally, and there is no necessity for repairs *beyond* what may suffice for this purpose.

but in such a degree, only, as may suffice to preserve it in its original state.

If a person appropriate a *house*, with this condition, that his *son* or any other person shall reside therein during life, the repairs are incumbent upon him who has the right to inhabit it, because he who enjoys the profit must also bear the loss, (as has been already stated,) and the case consequently resembles the subsistence of a slave whose service has been bequeathed to any person by his master. If, therefore, the person in question refuse or neglect to repair the house, or be incapable of so doing, from poverty, the magistrate must in this case let it, and provide for the repairs out of the rent; and must return it to him upon the repairs being completed; because, by this means attention is paid to the rights both of the appropriator and of the person to whose use it is appropriated, since, if it were not duly repaired, the tenement would be lost, and the rights of both would be consequently

The repairs of a *house* are incumbent upon the *individual owner*. *tantum pro tempore*;

or if he neglect this, the magistrate must let the house, and furnish the repairs out of the rent:

but the occupant is not liable to any compulsion;

destroyed; the repair must therefore be provided out of the rent, in order that the rights of the parties may be secured. It is to be observed, however, that where the person to whom the article is appropriated *refuses* to make the repairs, he is not to be *compelled*, because the repairs would be at his loss, his case being the same as that of the proprietor of the seed, in a contract of cultivation, who, if he refuse to cultivate the land, is not liable to any compulsion, as the cultivation cannot be effected without the loss of his property, namely the *Seed*.

OBJECTION.—Upon the occupant refusing to make the repairs, it would appear that the magistrate should not return the house to him after the repairs are completed; because, as he thus assented to the destruction of his right, any attention to that is unnecessary.

REPLY.—The refusal of the occupant to repair the house does not argue his assent to the destruction of his right, as there is a doubt with respect to the *motive* of his refusal, since it is possible, that he has refused merely on account of the expence to his property; his right, therefore, is not destroyed, because of the doubt.

and none can let the house but the magistrate.

—It is proper to observe that it is not lawful for the *occupant* to let the house, since he is not the *proprietor*. The *magistrate*, on the contrary, possesses a general power, as being the agent of the community.

Decayed materials are to be used for repairs.

SUCH buildings or materials of an appropriation as become damaged or useless, must be employed by the magistrate in the repairs of it, where necessary; and if these be not immediately necessary, he must keep the articles in question until such time as occasion offers, when he must employ them in making the necessary repairs; as repairs are required from time to time, in order that the appropriation may be continually preserved, and the design of the appropriator answered. If the materials of the decayed place be damaged so much as to render it impracticable to employ them in the repairs, (by the *timbers* being *broken*, for instance,) it is incumbent on the magistrate to sell them, and expend the price in such repairs: but it is not lawful for him

him to give them to the occupants, because the timbers, and so forth, are constituent parts of the actual appropriation, in which no person has any right,—their right being merely to the *use*, and not to the thing itself.

If a person appropriate an *house* (for instance,) with a reserve of the income to his own use during life, and after his death to go to the poor, this is lawful, according to *Abou Yoosaf*. Our author remarks that this is deemed lawful by *Abou Yoosaf*; but that, judging from the opinion of *Mohammed*, it is unlawful;—and such is the opinion of *Hillal Kasee* and *Shafei* respecting it. Some allege that the difference between *Abou Yoosaf* and *Mohammed* upon this point is occasioned by their difference of opinion concerning the necessity of *consignment*; for, according to *Mohammed*, the consignment of the appropriation to the *Mootwalee*, or procurator, is an essential, and consequently it is unlawful for the appropriator to reserve the income to himself: according to *Abou Yoosaf*, on the contrary, this is lawful, as he does not hold the consignment to a procurator to be an essential. Others, again, allege that their difference upon this point is not occasioned by their difference upon any other point, but is merely an original difference of opinion with respect to the present case itself. This difference of opinion between the disciples subsists in every case, that is, whether the appropriator reserve the *whole* or a *part* only of the income to himself during life, and after his death to go to the poor. If, also, the appropriator reserve the whole or part of the income from his appropriation to the use of his *Am-Walids*, or his *Modabbirs*, during their lives, and after their deaths destine it to the poor, some say that this is lawful according to all our doctors. Others, however, maintain that, in this instance also, the above difference of opinion obtains: and this is approved, because his reserving the income to *their* use for their lives is equivalent to his reserving it to *his own* use. The argument in favour of *Mohammed's* opinion is that appropriation is a *gratuitous act*, effected in the transfer of a property to God, by delivering over

Case of appropriation, with a reserve of the use to the appropriator during life;

over the thing appropriated to a *Mubtawalee* or procurator; (for a transfer to the Almighty, who is himself the proprietor of all things, although it cannot be effected *actually* and *expressly*, yet may be so *dependantly*;) and the reserving of the whole or part of the income arising from it to his own use is repugnant to this, because, the delivery cannot be made to *himself*.—The case, therefore, resembles the reserve of an *alms-gift*,—and also the reserve of a part of a mosque:—in other words, if a person were to assign certain property to the poor, stipulating at the same time, that his right in part of it should continue, the alms under such a condition are unlawful;—or, if the founder of a mosque stipulate that his right in a part of the mosque shall continue, this opposes the legality of the whole foundation:—and so also in the case in question. The arguments of *Abou Yezaf* upon this point are threefold. **FIRST**, the prophet was accustomed himself to consume the revenue arising from what he had appropriated. Now the use would not at any rate be lawful, unless the appropriator had previously stipulated it for himself at the time of appropriation; the prophet consuming the revenue, therefore, argues that it is lawful for an appropriator to reserve that to his own use. **SECONDLY**, *appropriation* implies the owner of a property destroying his right in that property by a transfer of it to God, under some pious intention, (as was formerly stated;) and such being the case, where an appropriator reserves a part or the whole of the revenue arising from what he appropriates to his own use, it follows that, in so doing, he reserves to himself a thing which is *the property of God*, (*not* that he reserves to himself what is *his own*;) and a person's reserving to himself a thing which is the property of God is lawful; thus, if a man build a *caravansera*, or construct a reservoir, or give ground for a burial-place, reserving to *himself* the right of residing in the *caravansera*, or of drinking water out of the reservoir, or of interment in the burial-place, it is lawful; and so likewise in the case in question.—**THIRDLY**, the design, in appropriation, is the performance of an act of piety: and piety is consistent with the circumstance of a person reserving the revenue to his own use,

use, as the prophet has said “ *A man giving a subsistence to HIMSELF is giving ALMS* *.

IF the appropriator reserve to himself a right of changing the lands he appropriates for any other lands, at pleasure, it is lawful, according to *Abou Yoozaf*. *Mohammed* maintains that the appropriation itself is valid, but that the condition reserved is void; because the condition does not prevent an extinction of right of property; and the appropriation is consequently complete, because of the extinction of this right; but the *condition*, as being invalid, is void, in the same manner as the reserve of a right of change, in the foundation of a mosque, is void.

or, with a reserve of a liberty to change the subject;

IF the appropriator reserve to himself a right of option with respect to his appropriation, for three days, by saying (for instance) “ I appropriate this house to such and such purposes, with this condition, that I shall have a right of option for three days;” according to *Abou Yoozaf* both the appropriation and the condition are lawful. According to *Mohammed*, on the contrary, the appropriation is null. Their difference of opinion upon this point originates in the difference of their doctrine respecting a reserve of the revenue of an appropriation to the use of the *appropriator*: for as, according to *Abou Yoozaf*, an appropriator may lawfully reserve to his own use, during life, the revenue arising from what he appropriates, it follows that he deems it lawful that the appropriator reserve a right of option for three days, for the purpose of consideration. *Mohammed*, on the other hand, holds that the possession of a *Mootwalee* or procurator, is an essential, and as a reserve of option prevents possession from being

or, with a reserve of a right of option;

* As where (for instance) a man appropriates *the whole* of his property, thus reducing himself to poverty; in which case the charity is as effectual with respect to *him* (where he necessarily reserves a sufficiency from the product for his own sustenance) as with respect to *any other pauper*.

completely

completely taken, it follows that, according to him, the appropriation is void. An appropriation, moreover, is not complete without the will of the appropriator; and as, where he makes a reserve of option, this cannot be ascertained, it follows that the appropriation is void; and being once *void*, its validity cannot afterwards be restored by the condition ceasing to operate.

or with a re-
serve of author-
ity.

If a person appropriate land, with a reserve of his authority over it, it is lawful, according to *Abou Yoozaf*.—Our author remarks that *Kadooree* has expressly declared this. Such also is the doctrine of *Hillál*: and it is, indeed, the generally received opinion. *Hillál* particularly mentions it in treating of appropriations. Some doctors allege, that if the appropriator particularly stipulate a reservation of authority over the lands, this authority remains to him accordingly; but not unless it be particularly stipulated by him. Our modern doctors, however, consider it as very doubtful whether this be an opinion of *Mohammed*, because it is a tenet of his that delivery into the hands of a procurator is essential to the validity of an appropriation; and where such delivery takes place, the appropriator can no longer possess any authority over it. According to the tenets of *Abou Yoozaf*, on the other hand, the delivery to a procurator is not an essential, and consequently the authority remains with the appropriator, although he should not have so stipulated. What was mentioned above, concerning the opinion of *Mohammed*, that “where the delivery to a procurator takes place, the appropriator can no longer retain any authority over the appropriation,” applies to a case where the appropriator had not stipulated any reservation of authority to himself at the *first*;—for if he had stipulated this at the time of making the appropriation, his authority is not rendered void by delivery to a procurator; because as *his* authority continues where he stipulates a right of authority in behalf of *another*, it follows that, where he stipulates it in behalf of *himself*, it continues *a fortiori*.—The arguments in support of the opinion of *Abou Yoozaf*; (which is the most generally

nerally received doctrine,) are twofold. **FIRST**, the procurator enjoys his authority, only on behalf of the appropriator, in consequence of his reservation; and it is impossible that the appropriator himself should not be possessed of any authority, at the same time that another person enjoys an authority held on his behalf.—**SECONDLY**, the appropriator stands in a nearer relation to what he appropriates than any other person, and it is consequently proper that he possess an authority over it; in the same manner as where a person builds a mosque, in which case the business of repairing it, as well as the appointment of all the officers, &c. appertains solely to him; or as where a person emancipates a slave, in which case the *Will* appertains solely to him, as he stands in a nearer relation to the slave than any other person.

If, however, the appropriator who makes this condition, (namely, a reservation of authority to himself,) be a person of infamous character and unworthy of confidence, the magistrate may take the appropriation out of his hands, from a regard to the interest of the poor; in the same manner as he is at liberty to suspend the powers of an *executor*, where he happens to be a person of bad character, from a regard to the interest of the orphans. If, also, an appropriator constitute another the *Mootwale* or procurator, declaring that “the sovereign or magistrate shall not take the appropriation out of his charge,” yet these are at liberty to take it from him, where he happens to be a person of bad character;—because, as such a declaration is repugnant to the precepts of the *LAW*, it is consequently void.

SECTION.

If a person build a mosque, his right of property in it is not extinguished so long as he does not separate it from the rest of his property.

founder,
otherwise
than by the
performance
of public wor-
ship in it.

perty, or give general admission to people to come and worship in it; but as soon as the people in general, or a single person, say their prayers in it, his right of property is extinguished, according to *Haneefa*. The utter separation of it from the rest of the appropriator's property is indispensable, for this reason, that the mosque cannot become dedicated solely to God until that be effected: and the performance of *prayer* in it is a condition; because, as a consignment (according to *Haneefa* and *Mohammed*) is indispensable, it follows that consignment is requisite in this way, since consignment must be carried into execution in whatever way may be proper to the nature of the appropriation, and the mode of consignment proper to a mosque is *public worship*; or, the performance of prayer is a condition, because as it cannot be conceived that God *himself* should take possession of a mosque, it follows that that which is the *design* must stand as a substitute for the *taking possession* of it. It is proper in this place to observe that if a *single person* say his prayers in the mosque it suffices, (according to one report from *Haneefa* and *Mohammed*;) because, as it is impossible that *all* men should perform their prayers in it, the circumstance of a single individual performing his prayers is the condition. It is also reported, from *Haneefa* and *Mohammed*, that the performance of prayer by a *whole congregation* is a necessary condition, because a mosque is founded with a view to *public worship*. *Abou Yoosaf* maintains that the founder's right of property is destroyed immediately upon his saying "I constitute this a *mosque*!"—because he does not hold consignment to be a condition, since according to him appropriation signifies a *relinquishment of rights on the part of the individual*; the thing appropriated, therefore, appertains solely to God merely in consequence of the right of the individual ceasing,—as was before demonstrated.

Cases of a
mosque, as
connected
with a dwell-
ing place.

If a person erect a building of two stories, making the under story a mosque, and the upper story a dwelling, or *vice versa*,—with the door of the mosque towards the public road, and detach the
mosque

mosque from his own property [in the manner before described,] he is nevertheless at liberty to sell it;—or, if he die, the mosque is an inheritance;—as the mosque does not, in this instance, appertain solely to God, because of the individual's right in it still subsisting. This, however, is only where the dwelling has not been constructed merely for the purposes of the mosque; for if it have been constructed for the purposes of the mosque, (as in the great mosque at *Jerusalem*,) the appropriation is absolute. *Hasan* reports, from *Haneefa*, that if the lower story be a mosque, and the upper story a dwelling, the former continues for ever a mosque; because a mosque is one of those things which are designed to continue in perpetuity, and an *under* story answers this purpose better than an *upper* story. The *reverse* of this is reported from *Mohammed*, because *reverence* is indispensably due to a mosque, and where an upper story is constructed over a mosque, for the purpose either of dwelling in, or of letting out to hire, this reverence cannot be observed. It is recorded, also, that when *Abou Yoosaf* went to *Bagdad*, and beheld the narrow and crowded condition of the place, he held the appropriation to be lawful and absolute in either case,—that is, whether the mosque be in the *lower* story and the dwelling in the *upper*, or *vice versa*:—but this he admitted out of necessity. The same is recorded of *Mohammed*, when he went to *Rai**, and for the same reason.

If a person convert the center hall of his house into a mosque, giving general admission into it, still it does not stand as a mosque, but remains saleable and inheritable;—because a mosque is a place in which no person possesses any right of obstruction;—and wherever a man has such a right with respect to the surrounding parts, the same must necessarily affect the place inclosed in them; this place, therefore, cannot be a *mosque*:—besides, it is necessarily a thoroughfare for the family, and consequently does not appertain solely to God. It

* The capital of *Irrak*, (the ancient *Chaldea*.)

is reported from *Mohammed* that the center hall of a house, thus constituted a mosque, cannot afterwards be given away, sold, or inherited: he consequently considers it to stand as a *mosque*;—and *Abou Yoozaf* is of the same opinion;—because, as the person in question was desirous that this place should become a *mosque*, and as it cannot become so without a road, or entrance into it, the road is included without specification, in the same manner as in a case of *bire*.

Ground appropriated to building a mosque cannot be sold or inherited.

If a person appropriate ground for the purpose of erecting a mosque, he cannot afterwards resume or sell it, neither can it be inherited, because this ground is altogether alienated from the right of the individual, and appertains solely to God. The reason of this is that all things whatever are originally the property of the Almighty: when, therefore, the individual relinquishes his right in the ground, it reverts to its original state, and his power over it terminates; in the same manner as a master's power over a slave terminates in consequence of manumission, and cannot be resumed.

A mosque cannot, in any instance, revert into the property of the founder.

If the place in which a mosque is situated should become deserted or unhabited, inasmuch that there is no farther use for the mosque, no person coming to worship therein, still it continues to stand as a *mosque* (according to *Abou Yoozaf*), and does not revert to the founder; because, as he had put it out of his own possession, it cannot again become his property. *Mohammed* alleges that the mosque again becomes the property of the founder, or of his heirs, in case of his decease; because he had erected it for the purpose of public worship; and as that has ceased, the mosque is in the same predicament with the materials for building a mosque: In other words, if there be no farther occasion for materials (such as bricks and so forth) designed for the erection of a mosque, they revert to the founder, and so also in the case in question. This, however, is a conclusion which does not accord with the doctrine of *Abou Yoozaf*, for he holds that where there is no farther occasion for those materials in the construction of *this* mosque, they must be carried to *another*.

IF a person construct a reservoir for public use, or a *caravanfera* for travellers, or erect a house upon the infidel frontiers for the accommodation of the *Mussulman* warriors in their excursions, (which is termed a *Ribât*,) or dedicate ground as a burying-place, his right of property therein is not extinguished until the magistrate issue a decree to that effect;—because no termination of the proprietors right takes place in this instance, insomuch that he may still lawfully continue to use those things, (by residing in the house or *Ribât*, or drinking water out of the reservoir, or interring in the burial-place.) It is therefore requisite either that the magistrate issue a decree, in order to complete the alienation, or that the founder himself refer the appropriation to his decease, in order that it may stand as a *bequest*, and become absolute upon that event;—in the same manner as in the case of an appropriation made to the use of the *poor*. It is otherwise in the case of a mosque, because in that instance no right of usufruct remains to the founder, as the mosque appertains solely to God independent of any magisterial decree. All that is here advanced is according to *Haneefa*. *Abou Yoosaf* is of opinion that the person's right of property ceases on the instant of his saying “ I have made “ this for such and such purposes,” (of residence, interment, or so forth,) because with him it is a rule that appropriation is absolute, and that consignment is not a condition of it. *Mohammed* maintains that as soon as people drink water out of the reservoir, or enter the *Caravanfera*, or warriors take up their residence in the *Ribât*, or interment takes place in the burying-ground, the proprietor's right is extinguished; because consignment (which he holds to be a condition) is established by such acts, as the consignment of any thing must be made in the mode proper to that thing. It is sufficient also, (according to him,) if these acts be performed by, or with respect to, only a *single individual*; because as the *whole community* cannot engage in those acts, regard must necessarily be had to them as performed in any single instance. Wells and fountains are also subject to the same rule.

Cases of appropriations made to the use of the community at large.

If,

They may be
consigned to
a procurator.

If, in the cases last recited, the founder consign the article to a *Mootwalce* or procurator, such consignment is approved, because the procurator is in the character of a deputy, and the act of the deputy is the act of the principal. With respect to a mosque, indeed, some allege that the delivery of it to a procurator is not a complete consignment, because there is no business for a procurator in a mosque. Others again say that consignment is established, as it is necessary, in a mosque, that there be some person to keep it in order, and lock up the doors; the consignment of a mosque, therefore, to a procurator, is approved. Some also assert that a burying-ground is considered in the same light as a mosque in this particular, because the procurator of a burying-ground is an office not in use. Others, again, maintain that it resembles a reservoir, or *caravanferra*; if, therefore, it be delivered to a procurator, consignment is established; because such an appointment is valid although it be contrary to general usage.

Appropriations may be
consigned to
the prince or
chief magistrate.

If a man, having a house in *Mecca*, appropriate it to the accommodation of pilgrims, or, if a person, having a house in any other place, appropriate it to the accommodation of the poor, or mendicants, or, having a house upon the frontiers, dedicate it to the accommodation of the *Mussulman* warriors and their cattle, or dedicate the revenue from his lands to the support of the warriors in the way of God*, and make over or consign those houses or lands to the prince, (who is impowered to act in those particulars,) such consignment is lawful. If, therefore, the person in question be afterwards desirous of revoking his appropriation, he cannot lawfully do so, for the reasons before alleged. The revenue arising from the lands, however, is lawful to the *poor only*, and not to the *rich*:—but the use of any of the other articles (such as residing in the *caravanferra*, or drinking water from the well, fountain, or reservoir,) are lawful to *rich* and *poor* alike.

* That is, engaged in war against the infidels.

The reasons of this distinction are twofold. **FIRST**, people in general, in the appropriation of a revenue, intend only the relief of the needy, whereas, in that of the other articles, the accommodation of rich and poor is equally intended. **SECONDLY**, the articles of drink and lodging are requisite, equally, to the rich and to the poor; but in the article of pecuniary assistance the rich are not necessitous, on account of their wealth, whereas the poor are necessitous.

H E D A R A.

B O O K XVI.

Of S A L E.

Definition of
the terms
used in sale.

BEEYA, or *sale*, in the language of the LAW signifies an *exchange of property for property with the mutual consent of the parties*. *Shirra* signifies *purchase*. The seller is termed *Báyee*: the purchaser *Mooshterree*: the thing sold *Moobea*: and the price *Simmin*.

- Chap. I. Introductory.
- Chap. II. Of Optional Conditions.
- Chap. III. Of Option of Inspection.
- Chap. IV. Of Option of Defect.
- Chap. V. Of *invalid, null, and abominable Sales*.
- Chap. VI. Of *Akda*, or the *dissolution* of Sales.
- Chap. VII. Of Sales of *Profit* and of *Friendship*.
- Chap. VIII. Of *Ribba*, or *Usury*.
- Chap. IX. Of *Rights* and *Appendages*.
- Chap. X. Of Claims of Right.
- Chap. XI. Of *Sillim* Sales.

SALB

SALE is completed by declaration and acceptance, the speech of the *first* speaker, of the contracting parties, being termed the *declaration*, and that of the *last* speaker the *acceptance*. Thus, if Zeid should first say to Omar: "I have sold to you a particular article belonging to me for ten *dirms*," and Omar should then say "I have bought that article belonging to you for the said price," the speech of Zeid is in that case termed the *declaration*, and that of Omar the *acceptance*. If, on the contrary, Omar should first say to Zeid "I have purchased a particular article belonging to you for ten *dirms*," and Zeid should then say "I have sold the same to you for the said price," the speech of Omar is in this case termed the *declaration*, and that of Zeid the *acceptance*.

Sale is contracted by declaration and acceptance.

It is a necessary condition that the declaration and acceptance be expressed in the *present* or *preterite* tense indicative; for if either be expressed in the *imperative* or *future* the contract is incomplete. Thus, if the seller should say to the purchaser, "Buy this article belonging to me for ten *dirms*," and the purchaser reply, "I have bought the said article for ten *dirms*,"—or, if the seller should say "I have sold this article to you for ten *dirms*," and the purchaser reply "I will purchase the said article for ten *dirms*,"—in neither case would the sale be binding.

expressed either in the preterite or the present:

It is to be observed that in the same manner as a sale is established by the words, "*I have bought*," or "*I have sold*;" so also is it established by any other words expressive of the same meaning;—as if either of the parties, for instance, should say "I am contented with this price," or "I have given you this article for a certain price," or "Take this article for a certain price; because, in sale, regard is had to the *spirit* of the contract, and the particular use of the words *bought* and *sold* is not required; whence it is that sale may be contracted simply by a *Tahita* or *mutual surrender*, where the seller gives the article sold to the purchaser, and the purchaser in return gives the price to the seller, without the interposition of speech. Some have

or by any expressions calculated to convey the same meaning.

alleged that this mode of sale by a *mutual surrender* is valid with relation to things of *small* value; but not otherwise. It is, however, certain that sale by a *mutual surrender* is valid in every case, as it establishes the mutual consent of the parties.

OBJECTION. It would appear that the sale, as recited above to be rendered complete by the words "*Take this,*" &c. is not valid, as it was before declared to be a necessary condition that both *declaration* and *acceptance* should be expressed in the *present* or *preterite* tense indicative, and neither of them in the *imperative*.

REPLY.—In this case the words "*Take,*" &c. are not of themselves a declaration, but merely indicate the existence of a declaration in the preterite tense;—as if the seller had first said "I have sold this thing," and were then to add "*Take this,*" &c. for the command is consequent to the declaration.

The acceptance may be deferred until the breaking up of the meeting; whether the declaration be made personally,

If either of the parties make a declaration, it is in the power of the other to withhold his acceptance or refusal until the breaking up of the meeting; and this power is termed the *option of acceptance* *. The reason of this is that if such a power did ~~not~~ rest in one of the parties, it must necessarily follow that the sale would take effect without his consent. It is to be observed, in this instance, that as the declaration is not of itself efficient to complete the contract, the person making the declaration is at liberty to recede from it.

or by letter, or message.

If either the buyer or seller should send a *letter* or a *message* to the other, that other has the power of suspending his acceptance or refusal until he leave the place or meeting where he received such message or letter.

An offer made by the purchaser cannot be re-

If the purchaser make a declaration of his purchase of merchandise at a particular price, the seller is not in that case entitled to construe his acceptance as limited to a *part* of the merchandise only at a

* Arab. *Khiâr-al-Kabool*.

rate proportionate to the declaration for the whole;—and, in the same manner, if a seller should make a similar declaration, the purchaser is not at liberty to construe his purchase after that manner;—because this is a deviation from the terms proffered; and also because the declarer has not expressed his assent thereto. If, however, the person who makes the declaration should specify a particular rate, opposed to particular parts of the merchandise, the acceptance may be limited. Thus if a person should say “I will sell this heap of grain for ten *dirms*,” the purchaser, if he declare his acceptance, is not in that case at liberty to limit his purchase to *half* the grain for five *dirms*; whereas, if the seller should say “I will sell this grain at the rate of “one *man* for a *dirm*,” the purchaser, after declaring his acceptance, may limit his purchase to what quantity he pleases.

stricted, by the seller, to any particular part of the goods;

unless he oppose a particular rate or price to particular parts or portions.

If either a seller or purchaser make a declaration, and one of the parties quit the place before any acceptance be expressed, the declaration so made is void.

If the acceptance be not expressed in due time, the declaration is null.

WHEN the declaration and acceptance are *absolutely* expressed, without any stipulations, the sale becomes binding, and neither party has the power of retracting unless in case of a defect in the goods, or their not having been inspected. According to *Shafei*, each of the parties possesses the *option of the meeting**,—(that is, they are each at liberty to retract until the meeting break up and a separation take place,) because of a saying recorded of the prophet “*The buyer and seller has each an option until they separate.*” Our doctors argue that the dissolution of the contract, after being confirmed by declaration and acceptance, is an injury to the right of one of the parties; and that the tradition quoted by *Shafei* alludes to the *option of acceptance*, as already explained.

Declaration and acceptance, absolutely expressed, render the sale binding.

If, at the time of concluding a contract of sale, either the merchandise, or the price, or both, be present and alluded to in it, (as if

Where the article and the price are

* Arab. *Kibit-al-Majlis*.

both produced, the sale is complete, without any specification of quantity or amount;

the seller should say "I have sold this wheat to you for these *dirms*," or the purchaser, "With these *dirms* now present I have purchased "such an article belonging to you,") in this case the sale is valid, although neither the quantity of wheat, (such as "*so many loads*," for instance,) nor the amount of the money (such as "*so many dirms*") be mentioned; for the reference made to them is sufficient to ascertain the subjects of the contract, and does not leave room for any dispute.

but a mention of money, without a specification of the sum, (unless it be produced upon the spot,) is not valid.

If, at the time of concluding the contract, the *dirms* or *deenârs* be not present, so as to admit of being referred to; in this case the general mention of them, without a specification of the *numbers* or of the *quality*, is not valid; because the delivery of them on the part of the purchaser is requisite; and as the general mention of them would occasion a contention between the purchaser and seller, (the one wishing to give a few and of a bad quality, the other insisting on a greater number and a better quality,) the delivery would therefore become impracticable. (It is here proper to observe that every species of uncertainty which may prove an occasion of contention is invalid, in a contract of sale.)

A sale may be entered into either for ready money, or with specification of a promised time of payment.

A SALE is valid either for ready money, or for a future payment, provided the period be fixed; because of the words of the *Koran*, "ABSOLUTE SALE IS LAWFUL;" and also, because there is a tradition of the prophet having purchased a garment from a *Jew*, and promising to pay the price at a fixed future period, pledging his coat of mail for the performance of it. It is indispensably requisite, however, that the period of payment be fixed, as an uncertainty in this respect might occasion a contention, and be preventive of its execution, since the seller would naturally demand the payment of the price *soon*, and the buyer would desire to *defer* it.

The price must be stipu-

A SALE, stipulating a payment of *dirms* in an absolute manner, (as

(as if a person should say "I have sold this for *ten dirms*,") is valid; provided however that all the different species of *dirms* be of the same value: and in that case the purchaser is entitled to pay the price in any of the species he pleases.—If the different species of *dirms* be of different value, the sale then rests upon that which is most generally in use. If, however, the different species be of different values, and it be impossible to ascertain the one of most common use, the absolute expression of *dirms* in this case renders the sale void, because the price being thereby rendered uncertain, a contention must necessarily ensue: still, however, if the parties choose to remove the cause of contention by voluntarily fixing the rate, the sale is valid.

lated at some known and determinate rate.

It is lawful to sell *wheat*, or other kinds of grain, either by means of measures of capacity, or by conjecture*, provided it be in exchange for a different kind of grain; because the prophet has said, "*Sell any thing that is in exchange for a different kind, in whatsoever manner you please and without regard to the quality*;" and also, because the uncertainty in this case proves no bar to its delivery. It is not lawful, however, to sell grain in exchange for the *same kind* by conjecture, because this is of an usurious nature.

Grain may be sold for other grain of a different species.

It is lawful, in sale, to use the measure of a particular vessel, of which the exact capacity may not be ascertained,—or the weight of a particular stone, the exact weight of which is not ascertained,—because the uncertainty in this case cannot be productive of contention, since either of these instruments of estimation may be used and the delivery take place immediately after; and it is not probable that the vessel or stone should be lost or destroyed in the interval between the measurement and the delivery, the only case in which a contention could arise. A measurement of this kind, however, is not allowed in *Sillim* sales (that is, where the price is advanced, and the merchandise

Goods may be sold by a weight or measurement which is not of any particular standard,

except in a case of *Sillim* sale.

* Meaning, by *Estimate*.

delivered

delivered afterwards,) because in such case there is a probability of the vessel or stone being lost or destroyed during the long interval that takes place between the conclusion of the contract and the delivery of the goods; in which case, as the parties had no other criterion (during the existence of the stone or vessel) than their *eye-sight* to judge from, a contention might afterwards arise as to the *size* or *weight* of the stone or vessel.

A sale fixing a particular price to each particular part or portion of goods, in the gross, extends only to *one* such part:

If a person sell a heap of grain, by declaring “ I have sold this “ heap at the rate of one *dirm* for every *Kafeez**,” in this case (according to *Haneefa*) the sale takes place in one *Kafeez* only; nor can it extend beyond that quantity, unless the seller should explain, in the same meeting, the sum of the *Kafeez*’s.—The two disciples are of opinion that the sale of the whole is valid in both cases. The reasoning of *Haneefa* is that it is impracticable to extend the sale to the *whole* of the heap, because both the goods to be delivered and the price to be received are in this case uncertain: it must therefore be construed as existing in *one Kafeez*, the only ascertained quantity. It is rendered valid, however, with respect to the *whole* quantity, by the removal of the uncertainty,—that is, by the seller either explaining the *total*, or ascertaining it by measurement during the meeting. The argument of the two disciples is, that the power of removing the uncertainty rests with the parties: and that the *uncertainty*, in this case, ought not to be deemed a bar to the validity of the sale; in the same manner as it is not a bar where a person sells *one slave* out of *two*, leaving it in the option of the purchaser to fix on *either* of them.

and a sale expressing the *whole* quantity, in this

If a person say “ I have sold my flock of goats at the rate of one “ *dirm* for each,” the sale in that case is altogether invalid,—in other words, it is not extended even to *one goat*,—according to *Haneefa*;

* A measure containing about sixty-four pounds weight.

and

and in the same manner, the sale is altogether invalid if a person sell cloth at the rate of one *dirm* the yard, without explaining the number of yards; and the same of every other article, such as *wood*, *pots*, or the like.—The two disciples are of opinion that, in all these cases, the sale is valid with respect to the *whole quantity*; because the removal of the uncertainty is in the power of the parties; and also, because such uncertainty does not prevent the validity of the sale, as is demonstrated in the preceding case. The arguments of *Haneefa* in support of his opinion are also the same as those advanced by him in the preceding case;—in which, however, he has admitted the validity of the sale with respect to one *Kafeez* of wheat, because all *Kafeez*'s of wheat being the same, no contention can arise in the delivery of it,—whereas, in the case in question, the different articles comprehending in themselves unequal unities, the delivery could not be made without contention.

way, is altogether void, unless the amount of the whole be particularly specified.

If a person purchase a heap of grain for one hundred *dirms*, on the condition of the heap amounting to one hundred *Kafeez*'s, and it be afterwards discovered to fall short of that amount, in this case the purchaser has the option of either taking the actual amount, at a rate proportioned to the terms of the contract, or of undoing the contract entirely; because a breach of the terms takes place before the deed is rendered complete, since, in order to render the deed complete, it is necessary that the actual quantity stipulated be taken possession of. If, on the other hand, the heap be afterwards found to contain an excess beyond the stipulated amount, the sale is valid with respect to the amount of the one hundred *Kafeez*'s, and the excess continues the property of the seller; because the sale is restricted to a *specific quantity*; and the excess is not included in the description, so as to be a *dependant* thereof, and not a *separate* article.

If the quantity agreed for fall short, the purchaser may either take it, or undo the contract;

but, if it exceed, the sale is valid to the amount of the quantity bargained for.

If a person sell a piece of cloth for ten *dirms*, on the condition of its contents amounting to ten yards,—or a piece of ground for one hundred

If the quantity be of a nature capable

ble of specification and fall short, the purchaser may either take it, or undo the bargain:

hundred *dirms*, on condition of its measuring one hundred yards,—and a deficiency afterwards appear, the purchaser has in that case the option either of cancelling the bargain entirely, or of taking the ground, or cloth, thus defective, at the stipulated price; for the specification of *yards* is a mere description of the *length* and *breadth*; and no part of the price is opposed to the *description* of the wares;—in the same manner as in cases with respect to *animals*;—in other words, if a person purchase a *goat*, which afterwards appears to want an *ear*, he would have the option of taking the defective goat for the price stipulated, or of undoing the bargain: but he would have no right to diminish the price on account of such defect, because no part of the price is opposed to the *ear* in particular, so as to admit of any fixed diminution on account of its deficiency;—and so also in the case in question. It is otherwise in the preceding case, relative to *wheat*; because there the deficiency comes under the head of the *quantity* and not the *description* of the wheat; and the price being opposed to quantity, a proportionate diminution is accordingly made from it. Still, however, the purchaser has the option of undoing the contract if he please, on account of the difference from the terms; his consent having been given to the purchase of one hundred *Kasces*'s. If, however, the ground or the cloth should prove *larger* than the description, in this case the excess becomes the property of the *purchaser*, and no option remains to the *seller*, because (as has been already explained) the specification of yards relates merely to *description* and not to *substance*. The case, in short, becomes the same as if he had sold a *slave* on the supposition of his being defective, but who afterwards proves to be perfect.

but if it exceed, the sale is binding to the amount agreed for.

If the quantity be so expressed as to relate both to *description* and to *substance*, the purchaser may either

If a person sell a piece of cloth, by declaring “ I have sold this
“ piece of cloth, which measures one hundred yards, at the rate of
“ one *dirm* for each yard,” and a deficiency should afterwards appear, in this case the purchaser has the option, either of taking it, with a proportional deduction from the price, or of dissolving the contract

contract entirely; because, although the specification of yards comes under the head of *description*, yet in this case the yards are considered as relating to the *substance*, the seller having opposed the price to *each* of them, which renders each (as it were) a *separate piece of cloth*. Besides, if the seller should take the defective quantity at the rate proposed for the *whole*, it would follow that the terms of the contract (namely the payment of *one dirm per yard*) did not take place:—if, on the other hand, the amount of the cloth exceed one hundred yards, the purchaser has the option, either of taking the *whole*, at the rate of one *dirm* for each yard, or of dissolving the bargain; for although he has an advantage in the receipt of more cloth than he had contracted for, yet this being tempered with a loss, in the necessity it lays him under of paying an *additional sum*, he is therefore left at liberty either to abide by the contract on these conditions, or to undo it.

stand to or undo the bargain, whether it exceed or fall short of the amount specified.

If a person purchase ten yards of a house or bath measuring one hundred yards, such purchase is invalid, according to *Haneefa*, whether the buyer may or may not have known the measurement of the whole house. The two disciples maintain that it is valid. If, on the contrary, a person purchase ten *shares* of a house or bath containing one hundred *shares*, it is valid, in the opinion of all our doctors. The argument adduced by the two disciples in support of their opinion is, that ten yards of a house of an hundred yards in capacity are in fact the same as ten *shares* out of an hundred *shares*. *Haneefa*, in support of his doctrine, argues that a *yard*, in its original meaning, is a stick applied to the purpose of measurement; but it is also used to denote the *thing measured*, and the thing so measured must be *relative* and not an *abstract idea of the mind*, such as a *share*: now it is impossible, in this case, to render such yards *relative*, since there exists an uncertainty, as no mention is made of the *particular side* of the house from which they have been measured; and such uncertainty would occasion contention between the parties. It is otherwise with respect to *shares*,

The sale of a specific number of yards of a tenement is null; but not the sale of a share.

for these are abstract ideas of the mind and not undefined relatives; and although, of consequence, an uncertainty exist with respect to *them* also, yet such uncertainty cannot occasion a contention, since the possessor of ten *shares* of the house may either enjoy them indefinitely, or may receive his share according to the mode prescribed in the division of joint property.

The purchase of a package of cloth is null, if it contain more or less than the quantity of pieces agreed for,

unless the seller previously specify the price of each particular piece.

If a person purchase a package containing cloth, on condition of there being *ten pieces* in it, and it afterwards appear that there are nine or eleven pieces in it, the sale is invalid, because of the uncertainty, with regard to the *price*, in the one case, and to the *merchandise* in the *other*; for in case of there being *nine pieces*, as the price of the piece wanting is unknown, that of the remaining nine is of consequence also unknown; and where, on the other hand, there is *one too many*, it is unknown which are the specific ten that ought to be delivered. If, however, the seller should explain the price of each piece of cloth, and there be *too few*, the sale is valid; but the purchaser has the option of undoing it if he please; whereas, if there be *too many*, it is invalid, because of the uncertainty with respect to the goods, as it would be impossible to ascertain the particular ten that are included in the sale.—Some have said that in case of *deficiency* also the sale is invalid, according to *Haneefa*. But this is unfounded.

A sale is null *in toto*, if the description of the goods be at all fallacious.

If a person sell two pieces of cloth, on the condition of their being *Herátee*, and one of them afterwards prove to be *Murwillee**, in that case the sale is completely invalid, that is, does not hold good even with respect to the *true* one, although the seller should have specified the prices of both; for when the seller joined together both pieces in the declaration of a sale of *Herátee* pieces, he, as it were, established a

* Of the manufacture of the provinces of *Herát* and of *Murwa*.

condition that the purchaser should accept a piece of *Murwallee*, which being a *false* condition the sale is therefore annulled.

If a person purchase a piece of cloth, on the condition of its measuring ten yards, and at the rate of one *dirm* for each yard, and the measurement afterwards prove to be ten yards and a half, or nine yards and a half, in this case the purchaser (according to *Haneefa*) must pay ten *dirms* in the *first* instance, and nine in the *second*; still having the option of undoing the contract if he please. *Aboo l'ooosaf* alleges that if the purchaser chuse to abide by the contract, he must pay eleven *dirms* in the *first* instance, and ten in the *second*. The opinion of *Mohammed* is, that in case the purchaser chuses to abide by the contract, he must pay ten and a half *dirms* in the *first* instance, and nine and a half in the *second*; because the measurement of a yard having been fixed at one *dirm*, it necessarily follows that *half* a yard must be rated at *half* a *dirm*. The reasoning of *Aboo l'ooosaf* is that as the price of each yard was fixed at one *dirm*, it follows that each yard becomes virtually a distinct piece of cloth; and as one of these proves defective, it follows that the purchaser has the option either of undoing the bargain, or of taking the goods according to the terms of the contract. The arguments adduced by *Haneefa* in support of his opinion are, that the specification of yards is considered as referring to the *description*, and not the *real quantity* of the thing, excepting only where the price of each given measurement is specifically stipulated as a condition of the contract. Now as, in the case in question, the rate is opposed to *each complete yard*, but not to any *smaller* quantity, it follows that such smaller quantity must be considered as remaining in its original form,—that is, as applying merely to *description*, and therefore cannot involve an additional payment. Some have observed that in coarse cotton cloths, of which the extreme and interior parts are of a similar texture, it is not lawful for the purchaser to take any excess beyond the terms of the contract; as it may be cut off and restored to the seller without any injury to the piece, in the manner of

Case of the
purchase of a
piece of cloth
at so much
per yard.

things estimable by *weight*; and hence the learned deem it lawful to sell even a *single yard* of it.

In the sale of a *house*, the foundation and superstructure are both included.

If a person sell the place of his abode (in other words, his *house*) the foundation and superstructure are both included in such sale, although they may not have been specified by the seller; because they are comprehended in the common acceptation of the term; and also, because, being joined to the ground in the nature of *fixtures*, they are considered as dependant parts of it.

In the sale of *land*, the *trees* upon it are included:

In a sale of *land*, the trees upon it are included although they be not specified, because they are joined to it, in the same manner as foundation and superstructure in the preceding case.

but not the *corn*:

In a sale of ground, the grain then growing on it is not included unless particularly specified by the seller; because it is joined to the ground, not as a *fixture*, but for the purpose of being cut away from it, in the same manner as goods of any kind which may have been placed upon it.

nor, in the sale of a *tree*, is the *fruit* then upon it included:

So also, if a person should sell a tree on which fruit is growing, the fruit belongs to the *seller*, unless it had been specifically included in the sale; because the prophet has said “*If a person sell a DATE tree with fruit upon it, the fruit belongs to the seller, unless the purchaser should have stipulated its delivery to him as a condition of sale.*” Besides, although the fruit be, in fact, a part of the tree, yet as it is intended to be plucked and gathered, and not to be suffered to hang on the tree, it is therefore the same as grain. It is to be observed, however, that in the sale of a tree with fruit, or of ground with grain upon it, the seller must be immediately desired to clear them away, and deliver the property to the purchaser; because, in these cases, the property of the purchaser and seller being implicated

but the purchaser must immediately clear these away.

implicated together, it becomes incumbent on the seller to clear away what belongs to him; in the same manner as if he had placed any of his goods upon the ground, in which case the clearance of them would have been requisite. *Shafesi* maintains that in both these cases the grain and the fruit must be suffered to remain until they become ripe, because there ought to be a period stipulated for the delivery of the things sold, and that period ought to be extended to the complete growth and maturity of these vegetables; in the same manner as in the case of a lease of ground, where if, at the expiration of the lease, the grain on the ground be *green*, it is suffered to remain until it ripen. Our doctors, on the other hand, argue that the obligation is the same on a *lessee*; and if he be permitted to extend the lease on account of the unripeness of the grain, he must, however, pay additional rent for it, which is a substitute for the delivery; and the *substitute* is in effect the same as the *thing itself*. It is to be observed that in the sale of a *tree*, the *fruit* is not included, whether it be of an appreciable nature or otherwise, unless it be specifically mentioned.

If a person sell a piece of ground in which seed has been sown, but of which the growth has not appeared above ground, in this case the seed is not included in the sale. If the apparent growth should have taken place, though not in such a degree as to render the vegetable of any value, in this case there is a difference of opinion. Some allege that the vegetation is *not* included in the sale; and others, that *it is*. This difference of opinion has its foundation in the different sentiments which the parties entertain with regard to the validity of the sale of vegetation, prior to its being fit to be cut down by the hook, or used by animals in the way of forage: for those who consider the separate sale of such vegetation to be valid are of opinion that it is not included; whilst those who consider the sale of it as invalid are of opinion that it is included in the sale of the ground.

In the sale of ground, the seed sown in it is not included.

The imme-
product is not
included, in
the sale of
land or trees,
although the
rights and
appendages
be expressed
in the con-
tract;

GRAIN and *fruit* are not included in a sale of ground, or of a tree, although the purchaser and seller specify the rights and appendages, (in other words, although the seller declare “ I have sold this “ ground, or this tree, with all its rights and appendages,”) because grain and fruit do not fall under these descriptions. (The *rights* of a thing are those without which it cannot be enjoyed, and which form the principal object of possession, such as a *water course* or a *road*:—the *appendages* are things from which we derive use, but which are more particularly considered as *dependant* parts, such as a *cook-room*, or a house for *keeping water*.)—In the same manner, if the seller should say “ I “ have sold this tree, or this piece of ground, with every thing small “ and great of its rights and appendages which I possess in it,” still neither the fruit nor the grain is included in it.—If, however, he should say in a *general* manner, “ I have sold this *tree*, (or this piece “ of *ground*,) with every thing great and small which I possess in it,” in this case the grain and the fruit are necessarily included in it.—It is to be observed that grain which has been cut, or fruit which has been plucked, cannot by any construction whatever be included in the sale, unless expressly mentioned as such.

nor unless all
its depen-
dencies be
generally ex-
pressed:

nor can any
product be
included af-
ter being *gath-
ered*, or *cut
down*.

Fruit may be
sold upon the
tree in every
state of
growth:

THE sale of fruit upon a tree is valid, whether the strength of the fruit be ascertained or not;—that is, whether it may or may not have reached such a degree of strength as may preserve it from common accidents;—because fruit is a property of certain value, either *immediately*, in case of its being *ripe*, or *hereafter*, in case of its being in an *unripe* state:—(some have said that the sale of fruit in a *weak* state is invalid: the first doctrine is, however, the most authentic:) and the sale of fruit in an absolute manner being valid, the purchaser must immediately take it from the tree, whether this be particularly expressed as a condition in the sale or otherwise. If, however, the condition of suffering the fruit to remain on the tree be stipulated, the sale is null, because such a condition is illegal, since it implicates together the right of property of the two parties, which is repugnant to the

but if the
contract in-
volve any
condition not
properly ap-
pertaining to
sale, it is *null*.

the nature of sale; and every condition of this kind invalidates the sale. Besides, in this case it must necessarily follow that one deed is interwoven with another; in other words, that either a loan or a lease is implicated with the sale, which is unlawful. In the same manner, the sale of grain, with a stipulation of leaving it on the seller's ground, is unlawful, and for the same reason. The same rule also obtains (according to *Haneefa* and *Abou Yoofof*,) where the fruit or corn has attained its *full growth*, as this implicates the right of property of two parties. *Mohammed* is of opinion that, in this instance, such a condition is lawful, because of the existence of the *whole* of the thing in question; whereas, in the former case, the part of the property which afterwards vegetated was not in being at the time of the conclusion of the deed; and the stipulation of a condition with regard to a nonentity being illegal, the sale is therefore null.

If a person purchase fruit upon the tree before it had reached its full growth, in an *absolute* manner, (that is, without stipulating the condition of its remaining upon the tree until it become ripe,) and afterwards, with the permission of the seller, suffer it to hang on the tree, in this case the additional growth becomes his lawful property. If, however, he act in this manner *without* the consent of the seller; he must then bestow the difference in charity, as being the produce of the property of another without the consent of that other.—If, on the other hand, the sale should have taken place when the fruit had attained its full growth, and the purchaser suffer it to remain until it become ripe, he is not on that account required to bestow any thing in charity, because in this instance a change from one state to another takes place without any increase being made to the substance.

The additional growth of fruit purchased on the tree, if suffered to continue upon it, by consent of the seller, is the property of the purchaser:

If a person, having in an absolute manner purchased fruit which had not attained its full growth, should afterwards suffer it to remain on the tree till it became ripe, by taking a lease of the tree till that period,

and so also, if the purchaser take a *lease* of the tree:

but this rule
does not hold
with respect
to grain pur-
chased upon
the ground.

period, in this case the increase of substance is lawful to him, because the lease is null, on account of a want of precise knowledge with respect to the period of it,—and also, on account of its not having been warranted by absolute necessity, since it was in the power of the lessee to have *purchased the tree itself*:—and the lease being null, there remains only the consent of the seller, to which regard must be had. It is otherwise where a person purchases grain upon the ground, and having then taken a lease of the ground until the grain be capable of being cut down, suffers it to remain until that time; for the increase of substance is not in such case lawful to him, since the lease so made is invalid, and an invalid lease is the occasion of baseness and abomination,

Any new
fruit which
may grow in
the interim,
is the pro-
perty of the
seller and pur-
chaser.

If a person, in an unconditional manner, purchase fruit upon a tree which had not completely vegetated, and afterwards, before he had received a formal seizure of it, new fruit should grow, in this case the sale is invalid, because of the impracticability of delivery on the part of the seller, from the impossibility of distinguishing between what *was* the subject of the sale and what was *not*. But if new fruit should appear *after* the seizure of the purchaser, such fruit is in an equal degree the right of *both*, because of its intermixture with the property of both. The assertion of the *purchaser*, however, with regard to the quantity is credited, because the fruit is in his possession. (The sale of artichokes or melons which are growing is subject to the same law as that of fruit growing upon trees.)

Rule in the
purchase of
vegetables.

If a person wish to purchase fruit, artichokes or melons, and afterwards to have it in his power to let them remain until they become ripe, or until they shall yield a new crop, so as to have a lawful claim to the property, the expedient to be practised, in order to render such conduct legal, is to purchase the *tree or bed itself*, and after clearing it
of

of the fruit when ripe, to undo the contract of sale with regard to the tree or bed*.

be sold on the tree, with a any part.

IF a person should sell fruit, with a reservation of a specific number of *Ratls* of it, the sale is invalid, whether the fruit be upon the tree or off it; because although the reservation be itself specific and known, yet the residue is unknown. It is otherwise where a reservation is made of a specific *tree*; because there the remainder is known, being obvious to the eye.—Our author remarks that this doctrine is conformable to a tradition of *Hasan*, adopted by *Tabávee*: but that such a sale is valid, according to the *Zabir Rawáyet*, and also in the opinion of *Shafei*, because it is a rule that whatever may be lawfully sold, separately, may also be lawfully excepted from a deed of sale. Thus the sale of one *Kafeez* from a heap of grain being lawful, the exception of it is also a lawful act.—It is otherwise with respect to a *fetus* in the womb, or any particular member of an animal; because as the separate sale of such subjects is illegal, so also is the reservation of them.

THE sale of wheat in the ear, or of beans in the husk, is valid; and the law is the same with respect to rice or rape seed in the husk. *Shafei* is of opinion that the sale of green beans in the husk, or of walnuts, almonds, or Pistachio nuts in the shell, is not valid; but with respect to wheat in the ear, he has given two opposite opinions. All these sales are, however, valid in the opinion of all *our* doctors. The reasoning of *Shafei* is that the subject of the sale, in these cases, is hidden within a thing of no value in itself, namely the *husk*, and that therefore the case becomes the same as if a goldsmith should sell a heap of earth mixed with particles of gold, in exchange for another

Grain may be sold in the ear, or pulse in the husk.

* The consent of the seller is here presupposed; for neither of the parties can undo a sale without the consent of the other. This expedient is therefore suggested on a supposition of the future undoing of the sale being equally agreeable to both parties.

heap of a similar nature, which is invalid. The arguments of our doctors upon this point are twofold. FIRST, the prophet has said “The sale of fruit upon the tree, or of grain in the ear, is invalid, unless it approach to a state of ripeness*.” SECONDLY, wheat is an article capable of yielding advantage; and hence the sale of it in the ear is valid in the same manner as that of *barley*, the one being an appreciable article as well as the other. It is otherwise with gold dust, for the sale of that, mixed with earth, is unlawful from the possibility of its being usurious.

The sale of a house includes the fixtures and their appendages.

If a person sell a house of which the locks are not of the *hanging* but of the *fixed* kind, in this case, the keys of such locks are considered as included in the sale; because the locks themselves are included in the house, in consequence of their being *fixtures*; and the sale of a lock includes the key, without its being expressly stipulated, because it is considered as a constituent part of it, since a lock without a key is of no use.

The seller must defray the expence of weighers, tellers, measurers, and money-essayers.

THE wages of the measurer† of the goods, or of the essayer of the money, must be paid by the seller:—the wages of the *measurer*, because, as measurement is essential to enable the seller to deliver over the goods, the payment of the expence attending that falls properly upon him; (and so also, the wages of *weighers* or *tellers*:)—and the wages of the *essayer*, because of a tradition, delivered by *Ibn Roostim*, that such is the doctrine of *Mohammed*; and also for this reason that the assay of the money takes place after the delivery, when it becomes the business of the *seller* to have it assayed, in order that he may distinguish what is his right and what is not; and that he may ascertain the bad coin in order to reject them. *Ibn Soomâi* relates it as the opi-

* Whence it may be inferred that the sale, in the ear, or upon the tree, is admissible.

† Meaning, properly, some person who is employed as a sworn or professed measurer.

nion of *Mohammed* that the *purchaser* should defray the wages of the *effayer*, because he stands in need of ascertaining the good *dirms* which he has stipulated to deliver, and the good *dirms* are known by means of an *effayer*, in the same manner as *quantity*, by means of a *measurer*.

THE charge of weighing the price is due by the *purchaser*, because he is under the necessity of delivering it to the seller, and the delivery is completed after the ascertainment of the weight. In a sale stipulating immediate payment, the purchaser must first deliver the price to the seller, because his right (namely the goods sold) is of a fixed and determinate nature, whereas the *price* is not so; and it is therefore incumbent on him, in order that both parties may be on a par, to deliver the price to the seller, which fixes and determines it; for it cannot be determined but by delivery*.

but the charge of weighing, the price must be defrayed by the *purchaser*.

IN a sale of goods for goods, or of money for money, it is necessary that both parties make the delivery at the same time; because being on a par in point of certainty and uncertainty, there is no necessity for a *prior* delivery.

In barter or exchange the mutual delivery must be made by both parties at the same time.

* Thus if the price stipulated be *ten dirms*, and the purchaser be in possession of a *thousand dirms* (for example) in this case, although the number ten be *determinate*, yet the units to compose that number and to be taken from a great number, are not specific and determinate, until actually delivered. This doctrine is frequently and particularly enlarged upon in the sequel of this book.

C H A P. II.

Of Optional Conditions *.

Definition of
the term.

AN optional condition is where one of the parties stipulates it as a condition that he may have the option, for a period of two or three days, of annulling the contract if he please.

A condition
of option may
be lawfully
stipulated by
either party,

THE stipulation of a condition of option, on the part either of the seller or purchaser, is lawful; and it may be stipulated to continue for three days or less; but it must not be extended *beyond* that term; because it is related that *Hooban* having been defrauded in several of his bargains, the prophet addressed him thus, "*HOOBAN, when you make a purchase bar deceit, and stipulate a condition of option.*"

* Arab. *Khiar-al-Shirt*. In contracts of sale there are five different options. These are, 1st. Option of acceptance: 2. Optional conditions. 3. Option of determination. 4. Option of inspection: and, 5. Option from defect. An *option of acceptance* is a liberty which either of the parties, in a contract of sale, has of withholding his acceptance, after the tender of the other, until the breaking up of the meeting. An *optional condition* is where one of the parties stipulates a period of three days before he gives his final assent to the contract. An *option of determination* is where a person, having purchased one out of two or three homogenous things, stipulates a period to enable him to fix his choice. *Option of inspection*, is the power which the purchaser of an unseen thing has of rejecting it after sight. *Option from defect* is the power which a purchaser has of dissolving the contract on the discovery of a defect on the merchandise.—The translator has thought it proper, in this note, to bring into one point of view an explanation of the several kinds of option, as it may possibly tend to give a clearer idea of them than what could be collected from the scattered definitions of them as they occur in the course of the work.

AN optional condition, stipulated to remain in force for a period exceeding three days, is unlawful according to *Haneefa*; and *Ziffer* and *Shafei* are of the same opinion. The two disciples, on the contrary, maintain that it may be stipulated to continue to any length of time whatever; because it is related that *Ibn Omar* extended it to *two months*; and also because it is ordained, by the LAW, for the purpose of answering the necessities of man, in enabling him to consider and set aside what is bad; and as a period of three days may not be sufficient for this purpose, the indulgence is therefore extended with respect to the *merchandise*, in the same manner as with respect to the *price*. The argument of *Haneefa* is that an optional condition is repugnant to the nature of the act, which fixes an immediate obligation on the parties, and is allowed only because of the saying of the prophet already quoted; whence it cannot be extended to a period beyond what has been there specified.

provided it exceed not the term of *three days*.

ALTHOUGH a conditional option beyond three days be not permitted, still if such a condition be stipulated, and the person making such stipulation, before the lapse of the three days, declare his acceptance of the contract, the sale is in that case valid, according to *Haneefa*. *Ziffer*, however, is of a different opinion; for he argues that the sale being invalid from the beginning, on account of the illegality of the condition, it cannot be afterwards rendered valid by the removal of such condition. The arguments of *Haneefa* on this point are twofold. FIRST, as the acceptance of the sale was declared before the lapse of the three days, the cause of its invalidity has not begun to operate. SECONDLY, the invalidity takes place on the *fourth* day; and as the acceptance is declared before that period, the sale is consequently kept free from any cause of invalidity. From this second argument some have considered that the invalidity of the sale does not take place until the commencement of the fourth day;—whilst others, (founding their opinion on the *first* argument,) hold that the contract

If it exceed three days, and the stipulating party declare his acceptance before the expiration of the *third* day, the sale is lawful.

was

was invalid from the beginning; but is afterwards rendered valid by the removal of the cause of its invalidity *previous to its operation*.

The payment
of the price
may be sub-
stituted as the
condition.

It is lawful for a person to make a purchase on this condition, that "if, in the course of three days, he do not pay the price, the sale shall be null and void." If, however, instead of *three* days he stipulate *four*, the sale is not valid, according to *Haneefa* and *Abou Roosif*. *Mohammed* is of opinion that it is valid, whether he stipulate four days or more. All our doctors however agree, that in case of such a stipulation having been made, if the purchaser, in the mean time, pay the price, previous to the lapse of the third day, the sale is valid. The reason of this is that a condition of this nature is of the same nature with an *optional condition*, because, in case the purchaser cannot furnish the price, the *seller* stands in need of a power to annul the act. As, moreover, *Haneefa* holds that a sale is invalid, where the condition of option extends beyond three days, but may afterwards be rendered valid by a formal confirmation previous to the lapse of the third day, so also in the case in question. As *Mohammed*, on the contrary, holds that the extension of the condition of option *beyond* the third day is lawful, so also in the present instance. *Abou Roosif*, on the other hand, although (contrary to analogy) he hold the extending of a *condition of option* beyond three days to be lawful, because of a tradition which he quotes to this effect, yet is of opinion that the same extension is unlawful in the present instance, (arguing from analogy,) as there is no tradition in support of it. There is another explanation, from analogy, with respect to this case, which has been adopted by *Ziffer*, to the following effect, that, in the sale in question, an *invalid* dissolution has been stipulated, (for the dissolution is invalid, as it depends upon a condition;) and as a sale is rendered void by the stipulation of a *valid* dissolution, it follows that by the stipulation of an *invalid* dissolution it is rendered void *a fortiori*. The reason, however, for a more liberal construction in this particular is, that the condition

here

here stipulated is considered as an equivalent to a condition of *option*, as has already been explained.

If the *seller* stipulate a condition of option, the right of property over the goods does not in that case shift from *him*, because the completion of the sale depends on the mutual consent of the parties, and the condition of option evinces that the seller has not completely consented. If, therefore, under these circumstances, the seller should emancipate a slave whom he had in that manner sold, the emancipation would hold good.—Neither is the purchaser in such a case entitled to use or employ the goods, although he should have taken possession of them with consent of the seller.—If, after the purchaser had possessed himself of the goods, they should perish or be destroyed previous to the expiration of the period of optional condition, he becomes in that case responsible for the value; because by the destruction of the goods the sale is annulled; (for the execution of it rested only on the consent of the *seller*; and where the subject of it is lost, the execution of it becomes impracticable; and it is null of course;) and as the goods were in possession of the purchaser with a view to purchase, (which circumstance renders a purchaser responsible for the value,) he is responsible accordingly. If, on the other hand, the goods be lost in the possession of the seller, the deed is annulled; and no payment is incumbent on the purchaser, in the same manner as in the case of an absolute sale, that is, a sale where no condition is stipulated.

The *seller*, by stipulating a condition of option, does not relinquish his property in the article sold:

If the condition of option be stipulated by the *purchaser*, the right of property over the goods shifts from the seller, because the sale is rendered complete on his part. The right of property, however, although it shift from the seller, does not vest in the purchaser, according to *Haneefa*. The two disciples have said that the purchaser becomes the proprietor; for, if this were not the case, it must necessarily follow that, after it moved from the seller, it would remain

but the property in it devolves upon the purchaser where the stipulation is made on *his* part; and he is consequently responsible for

subject

the loss of the
goods.

subject to *no* person; and this is a state not supposed by the LAW.

The arguments of *Haneefa* on this point are twofold. FIRST, as the right of property with respect to the price has not shifted from the purchaser, it follows that if the right of property with respect to the goods also vest in him, the property with respect both to the thing *purchased*, and the *return* for it is concentrated in one person, which is absolutely illegal. SECONDLY, If the right of property with respect to the goods were to vest in the *purchaser*, it might frequently happen that the goods would, in the interval, before the completion of the sale, be made away, without any intention on the part of the purchaser; (as if the purchaser had bought a slave related to himself within the prohibited degrees*;) and as the sole object of the reserve of option is the *benefit of the purchaser*, in allowing him time for consideration, it follows, that if the right of property were to vest immediately in him, he might be deprived of the advantage which is the object of the reserve of option.

If the purchaser have the option, and the goods be injured or destroyed in the interim, he is responsible for the price:

If the merchandise, where the stipulation of option is on the part of the *purchaser*, perish or be destroyed, the purchaser is in that case answerable for the price. In the same manner also, if the goods receive an *injury*, the purchaser is responsible for the price; because the goods, after sustaining an injury, cannot be returned, and the sale consequently becomes binding. The purchaser, therefore, is responsible for the price in either instance; for *destruction* necessarily implies previous *injury*; and hence in a case where the purchase is utterly *destroyed*, the sale *first* becomes binding and complete, and the destruction takes place *afterwards*; and as, in a case of injury, the payment of the price becomes obligatory, so also in a case of destruction. It is otherwise where the merchandise perishes in the possession of the *purchaser* when the option had been stipulated by the *seller*; for in

but if it rest with the *seller*, the purchaser is responsible for the value only.

* In which case the slave would become immediately free. See Vol. I. p. 432.

this

this case the purchaser is answerable only for the *value**; because the circumstance of the injury does not render the restitution impracticable, since the seller, in that case, has the option either of taking the merchandise thus injured, or of rejecting it, if he please, as the optional condition remains with him: and hence, as the sale does not become binding on the occurrence of the injury, if the seller chuse to confirm it, the purchaser in that case only pays the *value* of the injured merchandise.

If a person purchase his own wife, with a reserve of option for three days, in this case the marriage subsists during that interval, as the right of property does not take place because of the *optional condition*: and if he have carnal connexion with her during that interval, the condition of option is not thereby annulled; because he has it still in his power, after such connexion, to undo the sale, since his cohabitation with her is the exercise of a right in virtue of his *marriage*, and not of his *right of property*.—If, however, his wife be a *virgin*, his cohabitation with her annuls the condition of option, and establishes the sale, as it is a damage to her, and a diminution of her value.—This is the doctrine of *Haneefa*. The two disciples are of opinion that the husband becomes immediate proprietor of his wife by the optional purchase, whence the marriage is immediately annulled. If, therefore, he should have cohabitation with her, he cannot afterwards reject her, although she may have been a *woman*†; because, the marriage being null, the cohabitation was not in virtue of *marriage*, but of *property*.—This difference of opinion between *Haneefa* and the two disciples, respecting the property vesting immediately in a conditional purchaser, has given rise to opposite decisions in a variety of different cases. Of this number are the following.

Right of option, in the purchase of a wife, is not affected by cohabitation with her in the interim of option.

* And not for the price set upon it in the contract.

† That is to say, not a virgin.

Case of optional purchase of a slave related to the purchaser;

and of a slave optionally purchased under a vow of emancipation;

or of a menstruous female slave;

or of a pregnant wife.

If a person make an optional purchase of a slave related to him within the prohibited degrees, the emancipation, in the opinion of the two disciples, takes place immediately; whereas, according to *Haneefa*, it does not take place until after the confirmation of the contract.—If, also, a person make a vow to emancipate a slave whenever he becomes proprietor of one, then, according to the two disciples, if he make a conditional purchase of one, the emancipation takes place immediately; whereas, according to *Haneefa*, it does not take place till after the confirmation. If, also, a person make an optional purchase of a female slave, and her monthly courses happen during the term of option, these courses are included in the prescribed term of abstinence*, according to the two disciples; whereas, according to *Haneefa*, they are *not* included. And if the purchaser, availing himself of his optional condition, should return her to the seller, the seller need not observe the prescribed term of abstinence, according to *Haneefa*; whereas, the two disciples hold that such observance is incumbent on him.—If, on the other hand, a person make an optional purchase of his own wife, and if she, during the interval of option, bring forth a child, she is not an *Am-Walid* to the purchaser, according to *Haneefa*; whereas, according to the two disciples, she is so.—If, also, a person make an optional purchase of merchandise, and having, with the consent of the seller, received possession of it, afterwards give it in deposit to the seller, and it be lost in the interval, in this case, according to *Haneefa*, the trust is null and void, as the deposit was not the property of the purchaser, and therefore he is of opinion that the loss results to the seller; whereas the two disciples, holding the said deposit to be valid, are of opinion that the loss results to the purchaser, agreeably to the law of deposits.—If, on the other

* The purchaser of a female slave is required to abstain from carnal connexion with her until she shall have had three different courses from the period of her becoming his property, that it may be ascertained whether she be pregnant or not. (See *Edit.*)

hand,

hand, a privileged slave make an optional purchase, and the seller, during the interval of option, exempt him from the payment, in this case, according to *Haneefa*, the condition of option remains in force; because if he should return the merchandise, it follows that he does not chuse to accept of the property, and a privileged slave has the power of accepting or rejecting as he pleases:—but, according to the two disciples, the condition of option is annulled by the exemption of payment; because (in their opinion) the property having vested from the beginning, it follows that if he were to return the merchandise to the seller it would be in effect a *gift* to him, and a privileged slave has not the power of making a gift.—If, moreover, a *Zimnee* purchase of spirituous liquors from a *Zimnee*, on a condition of option, and the purchaser, in the interval, become a *Mussulman*, in this case, according to the two disciples, the condition of option remains no longer in force, because the purchaser having (agreeably to their tenets) become proprietor of the liquor, it follows that if he were permitted to reject it, he would create in another a right of property with respect to liquors which no *Mussulman* is allowed to use.—According to *Haneefa*, on the contrary, the sale becomes void, because the purchaser, (agreeably to his tenets,) not being then the proprietor, and the circumstance of becoming a *Mussulman* putting it out of his power to become the proprietor by removing the condition, the sale is of necessity annulled.

Optional purchase made by a privileged slave.

Case of optional purchase of wine by a *Zimnee*, who in the interim embraces the faith.

IN case of a sale on a condition of option, it is lawful, according to *Haneefa* and *Mohammed*, for the party possessing the option to annul the contract within the stipulated period, or to confirm it; which latter he may do without the knowledge of the other party: but it is not lawful for him to *annul* it without the knowledge of the other.—*Aboo Yoozaf* alleges that the party possessing the option may annul the contract without the knowledge of the other; and such, also, is the opinion of *Shaf'ee*.—The argument of *Aboo Yoozaf* is that the party possessing the option is empowered, on the part of the other, to annul

The possessor of option may *annul* the sale with the knowledge of the other party, or *confirm* it *without* his knowledge:

the contract; and that, therefore, such annulment cannot rest upon that other's knowledge of it; in the same manner as his knowledge of it is unnecessary in case the possessor of the option *confirm* the contract; as in the case of an agent for *sale*, (for instance,) who may lawfully act in every matter to which his agency extends, without the knowledge of his constituent, in virtue of the powers given to him on his behalf.—The arguments of *Haneefa* and *Mahammed* are, that a contract of sale involves the rights of both parties; and that the annulment of the sale by *one* party only is an exercise of a right partly belonging to the *other*, whilst at the same time such exercise may eventually be attended with a *loss* to the other: for supposing the possessor of the option to be the *seller*, and that he annul the sale without the knowledge of the purchaser, and the purchaser, in the mean time, in the confidence of the sale being complete, take possession of the merchandise, then, in case of its destruction, he must of consequence be responsible for it:—or, supposing the *purchaser* to be the possessor of the option, and that he annul the sale without the knowledge of the seller, then an eventual loss may result to the *seller*, as it is possible that, on the presumption of his goods being already sold, he may enquire out another purchaser. Hence, as such an exercise, on the part of either, of the right of the other, may be attended with an eventual injury, the annulment of an optional sale is therefore made to rest upon the knowledge of the other party.—This case, in short, resembles the dismissal of an agent: for if a person, having appointed an agent, should afterwards dismiss him without his knowledge, it would not be valid until the agent was himself informed of it; and so also in the case in question.—It is otherwise with the *confirmation* of a sale; as the exercise of such a right by one party only does not entail an injury.—The assertion of *Aboo Yoofoof* that “the possessor of the option is empowered to make such annulment on the part of the other,” is not admitted; for how can the other, who does not himself possess such power, bestow it upon the possessor of the option?

If the person possessing the option annul the sale without informing the other party, and such knowledge, nevertheless, reach him before the expiration of the stipulated period, then, because of his acquirement of such knowledge, the annulment is rendered complete. If, on the other hand, it should not have reached him until the expiration of the stipulated period, then the annulment is rendered complete, because of the expiration of the stipulated period.

and even if he annul it without the other's knowledge, and the other be informed before the expiration of the term, it is valid.

If a person possessing the right of option in a sale should die, the sale is then complete, and the right of option becomes void, and does not descend to his heirs.—*Shaf'ei* maintains that the option descends to the heirs, because, being a fixed and established right in sale, it may be inherited, in the same manner as an option in case of defect, or an option of determination. The arguments of our doctors are that an option is in reality nothing but *desire*, or *disposition*, which is not capable of being transferred from one to another; and nothing but what is capable of devolving from one person to another can be inherited.—It is otherwise with respect to option in case of *defect*, as that is granted to the heir, because of his right to obtain possession of a thing whole and complete, in the same manner as the deceased, and not because of his right of *inheritance*, since option is incapable of being a subject of inheritance. It is otherwise, also, with respect to an option of *determination*, as the heir becomes the proprietor in that instance, because of the *mixture of property*, and not because of his *right of inheritance*.

A right of option, in sale, cannot descend to an heir.

If a person, in purchasing any article, stipulate the option of another person, in this case, provided either the purchaser or the possessor of the option confirm the sale, it is valid; or, if either of them annul it, it becomes void.—The reason of this is, that the stipulation of the option of another is admitted, upon a *favourable construction*.—*Analogy* would suggest that it is inadmissible, and such is the opinion of *Ziffer*, because option being one of the articles of the contract, it follows

A right of Option may be referred to a third person.

follows that the stipulation of it for *another*, who is not one of the contracting parties, is illegal, in the same manner as if it were stipulated that some other than the purchaser should pay the price.—The arguments of our doctors are, that the establishment of the right of option, in one who is not a party to the contract, is by way of appointment from him to act as his substitute.—In this case, therefore, the option is vested both in the party and in his substitute; and consequently it is lawful for either of them to confirm or annul the contract.—If one of them should confirm, and the other annul the contract, in this case the *first* of these acts which may have been performed becomes valid. If both should have been performed at the same time, then (according to one tradition) the act of the *contracting party* is valid;—or (according to another) the validity of the *annulment* is preferred to that of the *confirmation*. The principle on which the first tradition proceeds is that the act of the contracting party is of superior force to that of a substitute who derives his authority from him; and the principle on which the second tradition is founded is that annulment is of superior force to confirmation, because annulment may take place after confirmation, but confirmation cannot take place after annulment. Some have asserted that the first tradition is conformable to the doctrine of *Mohammed*, and the second to that of *Abou Yoozaf*;—arguing from their different decisions in the case of an agent of sale and his constituent: for if both of them should at the same time sell the same thing to different persons, the sale of the constituent is valid, according to *Mohammed*;—whereas, according to *Abou Yoozaf*, both sales are valid; but the article sold must be divided between the two purchasers.

Case of selling two slaves, with a condition of option with respect to *one* of them.

IF a person sell two slaves for a thousand *dirms*, stipulating an optional condition with respect to one of them, the case admits of four different statements.—I. Where the seller does not oppose a specific price to *each* of the slaves, nor specify the one respecting whom the optional condition is to operate; and this is illegal, because of the un-

certainty

certainty both as to the subject of the sale and the price; for as the slave, concerning whom the condition of option is stipulated, is not (as it were) *included in the sale*, and as he is not specified, it follows that the other, who is the subject of the sale, is also unknown.—II. Where the seller sets a particular price upon each of the slaves, and also specifies to which the condition of option relates; and this is valid, because of the certainty with respect to the *subject* of the sale and the *price*.

OBJECTION.—It would appear that the sale is in this case illegal; because the slave who is the subject of the condition is not, in effect, included in the sale; and as both are joined together in one declaration, it follows that the acceptance of the sale with relation to what is *not* the subject of it, becomes a condition of the validity of the sale with regard to what *is*; it being the same, in short, as if a person should join a freeman and a slave in one declaration of sale, which is illegal, because the acceptance of the sale with regard to what is not capable of being the subject of it (namely, the *freeman*) is here made a condition of the validity of the sale with respect to the *slave*; and this condition is the cause of annulling the sale: it therefore follows that the sale is in the same manner invalid in the case in question, as the same condition (which occasions an annulment of the sale) is equally induced in this instance.

REPLY.—The sale, in the case in question, is lawful; because, although the acceptance of the sale, with respect to the slave concerning whom the option is stipulated, be a condition of the validity of the sale with respect to the other slave also, still such condition does not annul the sale, since the optional slave is a fit subject for sale: it is therefore, in fact, the same as if a person were to join a *Modabbir* and an *absolute* slave in one declaration; and as the sale is in that instance valid, so also in the case in question:—contrary to where a seller joins a slave and a *freeman* in one declaration; because a *freeman* is not a fit subject of sale.

—III.

—III. Where the seller opposes a particular price to each slave, but does not specify to which of them the condition of option relates.—IV. Where the seller specifies the slave to whom the condition of option relates, but does not oppose a specific price to each of them.—In both these cases the sale is invalid, because of the uncertainty of the *subject* of the sale in the *one* instance, and of the *price* in the *other*.

Option of determination.

It extends to a choice out of three, but not out of more.

If a person purchase one of two pieces of cloth for ten *dirms*, on the condition of his being at liberty for three days to determine on the particular piece which he may approve, such sale is valid; and the condition so stipulated is called an *option of determination* *.—A sale is in the same manner valid, where a person purchases, with a reserve of option, one out of *three* pieces; but it is not lawful to purchase in that manner one out of *four* pieces.—What is here advanced proceeds upon a favourable construction.—*Analogy* would suggest that the sale is not lawful in either of these three cases; because the subject of sale is uncertain;—and such, also, is the opinion of *Ziffer* and *Schafër*.—The reason for a more favourable construction is, that optional conditions have been ordained for the benefit of man, in order that he may thereby be enabled to set aside the bad, and to chuse the good for himself:—it is, moreover, evident that man stands in need of contracts of this nature, in order that he may be enabled to shew the merchandise to some person in whose judgment he confides; or, if an agent be employed, that he may shew it to his constituent; and this the seller would not permit him to do unless such a condition were stipulated.—This species of sale, therefore, being in effect the same as an *optional* one, it follows that it is in a similar manner lawful.—This necessity on the part of man, however, is fully answered by means of *three* pieces, as this number comprehends the three qualities of *good*,

* Arab. *Khiâr-al-ayem*.

bad, and *medium*; and there can be no uncertainty with respect to the subject of the sale, in this species of contract, to occasion contention, as regard is had solely to the price on which the purchaser determines.

OBJECTION.—Why then is it not lawful with respect to *four* pieces, as in that case also no contention would take place?

REPLY.—Although, in this case also, there would be no uncertainty with regard to the subject of the sale, to occasion contention, still the efficient cause of the legality (namely, the necessity of MAN) does not here exist; and it is therefore unlawful.

SOME have observed that, in a case of *option of determination*, a condition of option is also indispensable; and this is recorded in the *Jama Sagbeer*. Others again, (following the *Jama Kabeer*,) say that the condition of *option* is not requisite; and hence it is inferred that what has been recorded in the *Jama Sagbeer* is that such a condition *often takes place*; not that it is *absolutely necessary*. It is to be observed, however, that if, in a sale stipulating an option of determination, it should not be thought necessary to insert a condition of option, the period for determining the choice must in that case, according to *Haneefa*, be limited to three days: but according to the two disciples it may be fixed to whatever period they please. It is also to be observed that in a case of *option of determination*, the subject of the sale is one piece of cloth (for example), and the other piece is a deposit in the hands of the purchaser*. If, therefore, one of the pieces be lost or spoiled, the sale takes place with respect to it in exchange for the stipulated price; and the other price is as a *deposit*; because it is impossible to reject the piece which is lost or spoiled. If, on the other hand, *both* pieces be lost at the same time, the purchaser must in that case pay the half of the price of each, because the determination of

An option of determination may involve a condition of option:

but the term for making the determination must not, at all events, exceed three days.

Of the articles referred to the purchaser's choice, one is the subject of the sale, and the others are as *deposits*:

* And consequently (according to the laws of *deposit*) he is responsible in case of accidents, for *one piece only*.

purchase not having been made with respect to either of the pieces, it follows that sale and trust operate indefinitely with respect to each.

and both may be returned in case of a condition of option.

IF, besides the option of determination, a conditional option be also stipulated, the purchaser is in that case at liberty to return both pieces.

The heir of the person endowed with an option of determination may return one of the two articles referred to the purchaser's option, in case of his death.

IF a person possessing an option of determination should die, his heir is empowered to return one of the articles; for an option of determination (as has been before explained) necessarily descends to an heir, because of the implication of his property with that of another; whence he is not, in his option of determination, restricted to *three* days.—If, on the contrary, a person recently possessed of a power of option die, his heir has no option, as was before explained*.

Option is declared and the sale made binding, by any act of the purchaser in relation to the article sold.

IF a person purchase a house under a condition of option, and the adjoining house be afterwards sold before the expiration of the period of option, and the purchaser under the condition of option claim the right of *Sbaffa*, in this case his assent to the first sale is thereby virtually given, and his right of option exists no longer;—because his claim of *Sbaffa* presupposes him to be confirmed in the adjoining property, otherwise he would have no right to make such a claim; and it is therefore inferred, that he first tacitly annuls his condition of option, and then urges his claim. It is to be observed that the necessity of this explanation arises from the doctrine of *Haneefa*; for, by his tenets, a purchaser under a condition of option does not become proprietor of the article of sale during the interim of option. The two disciples hold, on the contrary, that he becomes immediate proprietor under the condition of option; whence this explanation is, with regard to *their* doctrine, unnecessary.

* Because a condition of option is not inheritable. (See p. 389.)

IF two persons purchase a slave, on this condition, that both purchasers shall have the option of rejecting him, and one of them afterwards expresses his consent, the other cannot reject him, according to *Haneefa*. The two disciples allege that if the other chuse, he may reject *his share* in the slave. The same disagreement subsists with respect to two purchasers in a case of *option of inspection* or *option from defect*. The argument of the two disciples is that as the power of rejection was vested in *both* the purchasers, it consequently operated in *each* of them; and the rejection of one cannot abrogate the right of option with respect to the other, as that would be a destruction of his right, which is not lawful. The argument of *Haneefa* is that the subject of the sale, when it issued from the tenure of the seller, was not injured by the defect of *participation*; but if *one* of the purchasers have the liberty of rejecting his portion *singly*, it necessarily follows that upon the rejection the seller holds the article in partnership with one of the purchasers; and this is a *defect* in the tenure, to which he was not before subject.

An option of determination, vested jointly in two persons, is determined by the subsequent consent of either to the purchase.

OBJECTION.—It would appear that the rejection of *one* of the purchasers is valid although attended with an injury to the seller, since the seller has himself virtually assented to it, because in giving such power to *two* persons, it is evident that he assents to a possible rejection by *one* of them.

REPLY.—The consent of the seller to the injury is inferred from from a supposition of his having consented that *one* might reject where the power of rejection was given to *two*. This, however, is not the case in the present instance; for it is to be supposed that the seller understood that *both* should declare their rejection *together*; and on *this* supposition his consent was given, not on the *other*.

IF a person purchase a slave on account of his being a *scribe*, or a *baker*, and he prove to be neither of these, the purchaser is in that case at liberty either to abide by the bargain, or to undo it, as he pleases; because the descriptive quality being the object he had in

If an article purchased under *one* description prove to be of *another* description,

the purchaser
may either
confirm or
annul the
contract.

view, and being specified as a condition in the contract, is therefore his right; and the want of it gives him the power of dissolution if he please, because his assent signified was on this condition, and not otherwise.

OBJECTION.—It would appear that the sale is in this case invalid, in the same manner as in the case of purchasing a *male* slave who afterwards proves to be a *female*.

REPLY.—The sale in the case quoted is invalid because of difference of *sex*, which does not exist in the case in question. Thus a person that *is* a baker or *not* a baker is of the same *sex* and differs only in the *quality*; and hence the analogous application of the one case to the other is unfounded. It is to be observed that a difference of the *sex* does not invalidate the sale, unless it defeat the purchaser's object. Thus the object in the purchase of a *man* (for instance) is different from that in the purchase of a *woman*, and therefore the sale is invalid in case of a difference: if, on the contrary, a man should purchase a *be-goat* on the supposition of its being a *female*, the sale would not be invalid, but it would remain with the purchaser to abide by it or not, as he pleases. It is to be observed, however, that, in the case in question, if the purchaser chuse to abide by the bargain, he must pay the whole of the price; as no diminution is admitted on account of the defect of *quality*, which (as has been before explained) is of a *dependant* nature.

C H A P. III.

Of Option of Inspection*.

A purchaser may reject an article, upon
If a person purchase an article without having seen it, the sale of such article is valid, and the purchaser after seeing it has the option

* Arab. *Khiṭr-al-Roṣṣat*.

of accepting or rejecting it as he pleases. *Shaf'ei* maintains that a sale of this nature is wholly invalid, because of the uncertainty with regard to the object of it. The arguments of our doctors are,—FIRST, a saying of the prophet, that “*whoever purchases a thing without seeing it, has the liberty of rejection, after sight of it.*” SECONDLY, the uncertainty with respect to the object cannot occasion litigation, since, if it be not agreeable, the purchaser is at liberty to reject it.

IF a person, having purchased an article unseen, should say, “I am satisfied with it,” in this case also he is at liberty, after sight of it, to reject it if he please, for *two* reasons. FIRST, as the *option of inspection*, (according to the tradition already quoted) rests entirely upon inspection, it follows that it becomes established by the inspection, whereas before that it was not established: and as the acquiescence signified *previous* to the inspection is not repugnant to this, it consequently *remains* established.

although, before seeing it, he should have signified his satisfaction.

OBJECTION.—If the right of option do not exist previous to the actual sight of the article of sale, it would follow that the purchaser, before inspection, has not the power of annulling the contract;—whereas we find, on the contrary, that he is actually possessed of this power *before* inspection.

REPLY.—His right to dissolve the contract, previous to this inspection, proceeds from the contract not being then binding; and not from any reference to the tradition above quoted.

—SECONDLY, The purchaser’s acquiescence in the article before he attains an actual knowledge of its qualities, is perfectly nugatory; and hence no regard is paid to his acquiescence previously signified:—contrary to his *rejection*, which *is* regarded, because the contract has not as yet become binding.

IF a person sell a thing which he himself has not seen, he has no option

A seller has no option of

inspection after sale.

*option of inspection**; because the tradition before cited limits this option entirely to the *purchaser*: moreover, it is related that *Osmán* sold a piece of ground belonging to him at *Baḡra* to *Tilba-Bin-Abēdoolā*; when a person said to *Tilba*, “you have been injured in this matter;” but he replied, I possess the liberty of rejection, *having purchased a thing unseen*:—after which another said to *Osmán*, “You have been injured in this *sale*,” and he replied, “I have the liberty of retraction, *having sold a thing which I had not seen*:” upon which *Mazim* was appointed arbitrator between them; and he decreed that the right of option rested only with *Tilba*; and this decree was given in the presence of all the companions of the prophet, none of whom objected to it.

The option of inspection continues in force to any distance of time after the contract, unless destroyed by circumstances;

such as would have annulled a condition of option.

THE right of *option of inspection* is not, like an *optional condition*, confined to a particular period: on the contrary, it continues in force until something take place repugnant to the nature of it.—It is also to be observed that whatever circumstance occasions the annulment of an *optional condition*, (such as a defect in the merchandise, or an exercise of right on the part of the purchaser,) in the same manner occasions an annulment of the option of inspection. If, therefore, the exercise of right be such as cannot afterwards be retracted, (such as the emancipation of a slave, or the creating him a *Modabbir*,)—or, if it be such as to involve the rights of others (such as *absolute sale*, *mortgage*, or *hire*,)—the option of inspection is immediately annulled, whether the thing have been seen or not; because these acts render the sale binding, and the existence of the option is incompatible with the obligation of the sale. If, on the contrary, the exercise of right be not such as to involve the right of others, (such as a sale with an *optional condition*, a simple tender to purchase, or a gift without de-

* That is, he has no power of *retraction*, if, upon inspection of the article sold, he should happen to repent of the sale.

livery,)

livery,)—the option of inspection is not *annulled* previous to the *actual sight* of the article sold; because acts of this description are not of a stronger nature than the *purchaser's acquiescence*; and as the purchaser's *express acquiescence* to inspection is not the cause of annulling the option of inspection, (as has been already demonstrated,) it follows that the acts above described do not annul it, *a fortiori*;—whereas those acts *after* inspection annul the option of inspection, as they indicate an acquiescence, and an acquiescence after the sight of the thing occasions the annulment of the option.

If a person should look at a heap of grain, or at the outward appearance of cloth which is folded up, or at the face of a female slave, or at the face and posteriors of an animal, and then make purchase of the same, he has no option of inspection. In short, it is a rule that the sight of all the *parts* of the merchandise is not a necessary condition, because it is often impracticable to obtain it, and therefore it is sufficient to view that part whence it may be known how far the object of the purchaser will be obtained. In the purchase, therefore, of articles of which the parts are similar, (such as articles sold by *weight* or *measurement of capacity*, and the mode of ascertaining the goodness of which is by presenting a sample to the purchaser) the sight of a *part* is sufficient; that is, no option of inspection can afterwards be claimed unless the other parts of the article should prove inferior to the part which has been *seen*. In the purchase, on the other hand, of things of which the individuals are not similar, (such as cloths or animals,) the sight of one does not suffice;—on the contrary, the purchaser must see each individual article. Of this kind are eggs and walnuts, according to *Koorokbee*. (The compiler of this work observes, however, that these are of the nature of *wheat* and *barley*, since their individuals are nearly alike.)—Now such being the established rule, it follows that the sight of a heap of wheat is sufficient, as the quality of what is hidden may be inferred from what is seen, wheat being an article sold by measurement of capacity, and the quality of which may consequently be ascertained

Option of inspection is destroyed by the sight of a *part* of the article, where that suffices as a sample of the *whole*.

by means of a *sample*: and in the same manner, the sight of the outside of a piece of cloth suffices, unless there be a particular part within the folds necessary to be known, such as (in *stamped* cloths) the *pattern*, in which case the option of inspection is not annulled until the purchaser see the inside of the piece. In the case of a man *, on the other hand, a sight of the *face* is sufficient; and in animals a sight of the *face* and *posteriors*.—Some allege that in animals a sight of the fore and hinder legs is necessary. What was first related is on the authority of *Abou l'osuf*. In goats purchased on account of their flesh it is necessary to squeeze and press the flesh in the hands, as that ascertains the goodness of it. But if purchased for *breed*, or for giving *milk*, it is necessary to look at their *dugs*. In purchasing victuals ready dressed it is necessary to *taste* them, to ascertain their goodness.

Option of inspection in the purchase of a house.

IF a person look at the front of a house, and then purchase it, he has no *option of inspection*, although he should not have seen the apartments:—and so also, if a person view the *back* parts of a house, or the trees of a garden from without. *Ziffer* has said that it is requisite that the purchaser inspect the apartments of the house. Our author also remarks that what is here advanced with respect to a sight of the *front* or *back* part of a house being sufficient, is founded on the customs of former times, when, all their buildings being of an uniform nature, the sight of the front or back parts sufficed to ascertain the *interior* parts; but that in the present time it is very necessary to enter in, as buildings are in those days variously constructed, whence a view of the *outside* is no standard by which to judge of the *inside*; and this is approved.

An agent for a king may inspect, in the

THE inspection of an agent appointed to take possession of an article purchased is equivalent to the inspection of the *purchaser*, and

* Meaning a *slave* set up to sale.

consequently,

consequently, after the inspection of such agent, the purchaser has no power of rejecting the article purchased, unless in a case of a defect. The inspection, however, of a *messenger* on the part of the purchaser is not equivalent to his *own* inspection. This is the doctrine of *Hancefa*. The two disciples hold that an *agent* and a *messenger* are in effect the same, (that is, the inspection of neither is equivalent to that of the purchaser,) and consequently, that the purchaser has afterwards the liberty of rejection in both instances. The argument they adduce in support of their opinion is, that as the constituent has appointed the agent merely to *take possession*, and not to annul his option, it follows that such annulment does not belong to him;—in the same manner as holds with respect to *option from defect*; in other words, if an agent should knowingly take possession of a *defective* article, the option of the purchaser is not thereby annulled;—and in the same manner, also, as holds with respect to a *condition of option*; that is, if a person should purchase any article, with a reserve of option, and his agent, in the interval, take possession of the article, the purchaser's right of option is not annulled;—and in the same manner also, as holds in the *wilful* annulment of an option of inspection; as if an agent should take possession of an article concealed, and after inspection expressly declare the option to be null; in which case the purchaser's right of option would nevertheless still continue in force.—*Hancefa*, on the other hand, argues that *seizin*, or the act of *taking possession*, is of two kinds.—I. *Perfect*, which is the seizin of the article with sight and knowledge. II. *Imperfect*, which is the seizin of it *without* sight, that is, *whilst it is concealed*. The *first* is termed *perfect*, and the second *imperfect*, because the completeness of *seizin* depends upon the completeness of the bargain*, which cannot be complete whilst an option of inspection remains; and as, in the *former* instance, this option has been done away, it follows that the bargain is in that instance complete and perfect; but as, in the *latter* instance, on the

same manner
as the purchaser.

* Arab. *Safka*, literally, the act of *striking hands*, in making a bargain.

contrary, it still continues in force, it follows that the bargain is in that instance *imperfect*.—Now as the *constituent* is empowered to take possession in either of these modes, it follows that the agent is equally empowered, since his constituent has appointed him, in an *absolute* manner, his *agent for seizin*. Where, however, an agent takes possession of an article without seeing it, his power is terminated by such imperfect seizin, and he consequently cannot afterwards exert an option of inspection, so as to destroy that privilege on the part of his constituent by any express declaration. It is otherwise in the case of an *option from defect*, because, as that is no bar to the completeness of the bargain, the seizin is in that instance *perfect*, notwithstanding the continuance of the option of defect.—Concerning the case of *condition of option* there is a difference of opinion.—Admitting, however, that the agent has *not* the power of annulling such option, it is because the *constituent himself* is not in this case empowered to make a perfect seizin, in as much as the *object* of such conditional option is *experience and trial*, which can only be acquired *after* seizin; and as the constituent himself is not empowered to make a perfect seizin, it follows that his *agent* cannot be so.—With respect to a *messenger*, he possesses no power, being barely commissioned to deliver a message, and cannot therefore be capable of taking formal possession of any thing.

The inspection of a *blind* person may be made by *touch*, *smell*, or *taste*;

SALE or purchase, made by a *blind* person, is valid: and after purchase, he has still an option, as having purchased an article without seeing it; which option is determined by the *touch* of the article, provided it be of such a nature that the touch may lead to a knowledge of it; or by the *smell*, if it be of a nature to be known by the smell; or by the taste, if the article be of an *esculent* nature;—in the same manner as all these modes determine the option of a person possessed of sight.

THE

THE option of a blind person, in the purchase of land, is not determined until a description of the qualities of it be given to him; because such a description is equivalent to a *sight* of the object, as in the case of *Sillim* sales.—It is recorded from *Abou Yoosaf*, that if a blind person, in purchasing land, should stand on a spot whence, if he possessed his sight, he might inspect the whole, and should then declare “I am content with this ground which I have purchased,” the right of option is annulled; because the standing on the spot in this manner is analogous to the *actual view* of it; and the semblance is equivalent to the reality where the reality is unattainable; as in the case of a *dumb* person, the motion of whose lips is deemed equivalent to the reading of the *Koran*; or, as in the case of a *bald* person, with respect to whom the motion of the razor to and fro over his head is deemed equivalent (in case of his making a pilgrimage to *Mecca*) to *actual shaving*.—*Hoofn-Bin-Zeeyád* has said that a *blind* person must appoint an agent for seizure, who may inspect and take possession of the article on his behalf; and this is conformable to the doctrine of *Hanefas*, who is of opinion (as has been already explained) that the inspection of an *agent* is equivalent to that of his *constituent*.

or (in a purchase of land) by description.

If a person, having seen one of two garments, should purchase both, and should afterwards see the other, he has then the option of *rejecting* both; because, as garments differ essentially from one another, a sight of one is not equivalent to a sight of *both*; and therefore his right of option remains with respect to the one he had not seen. He has it not in his power, however, to reject that one singly; for in such case an alteration in the bargain would take place before the completion of it *, as a bargain is not complete whilst an option of inspection

A sight of one of two articles, such as do not admit of *samples*, still leaves a power of rejecting *both*.

* A contract of sale, when settled by the parties, does not become complete until the execution of it; yet it cannot admit of any alteration of the terms of it in the interval. Thus, if two bushels of wheat be sold for two *dirms*, and the parties, before the execution

inspection remains: and hence it is that the purchaser may reject the article, independant of an order from the *Kásee*, or the consent of the seller; and such rejection is a dissolution of the sale from the beginning,—in other words, it becomes the same as if the contract had never existed.

The option is destroyed by the decease of the person with whom it rested.

IF a person possessing the option of inspection should die, the option in such case becomes null; for (according to our doctors) it is not a hereditament, as has already been explained in treating of *optional conditions*.

Cases of inspection previous to purchase.

IF a person, having once seen an article, should afterwards, at a distant period, purchase it, and the article, at the time of purchase, exist in the form and description in which he first saw it, he has not in this case any option, because he is possessed of a knowledge of the qualities from his former inspection; and an option is allowed only in *defect* of such knowledge.—If, however, the purchaser should not recognise or know it to be the same article, he has in that case an option; because under such circumstances his consent cannot be implied: or if, on the other hand, the nature of the article be changed, he has an option; because the qualities being changed, it becomes in fact the same as if he had never seen it.

IF a purchaser and seller dispute concerning any *recent* * change in the nature of the article,—the purchaser asserting this circumstance,

of the contract, mutually agree to reduce the sale to *one* bushel for *one dirm*, this agreement, as being an alteration of the terms previous to their fulfilment, would be unlawful. In short it is requisite, in this instance, either that the parties previously dissolve the first contract, and then enter into a new contract of sale of one bushel for one *dirm*; or that they formally complete the first contract by mutual seizure, and that the purchaser then sell one of the bushels to the seller for one *dirm*.

* Arab. *Hâdis*, [or *Hâdith*,] meaning, *supervient upon the contract*.

and the seller denying it,—in this case the allegation of the seller, confirmed by an oath, must be credited; because the interval between the sight and the purchase being short, the probability is in favour of the assertion of the seller, that such change did not happen till after the purchase had taken place. If, however, a *long* period should intervene between the sight and the purchase, our doctors are in this case of opinion that the allegation of the *purchaser* is to be credited; because, as it is the nature of every thing to decay in course of time, it follows that his assertion is supported by probability.

If the parties dispute concerning the period when the article was inspected, the seller asserting that the purchaser had first seen and then purchased the article, and the purchaser denying this,—in that case the allegation of the *purchaser*, upon oath, is to be credited.

If a person purchase a bundle of clothes of a *Zoota** without seeing them, and afterwards sell or give away part of them; in this case he has not the power of rejecting any of those that remain unless they should prove defective. In the same manner, if he purchase a bundle of clothes of a *Zoota*, stipulating a condition of option, and afterwards sell or bestow in gift part of them, his right of option is annulled; because it is not in his power to reject what he has no longer any property in; if, therefore, he were to reject the remainder, it would induce a deviation from the bargain before the completion of it; (for the existence of an option of inspection, or of a condition of option, is a bar to the completeness of the bargain.) It is otherwise in an *option from defect*; as the bargain, notwithstanding the existence of such option, is completed upon seizing the article

A person, after disposing of a part of his purchase, has no option with respect to the remainder.

* A tribe of black *Arabs*.—"Zoot.—A tribe of *Arabs* who formerly inhabited the "senny region lying between *Wadis* and *Bafra*; they were defeated and reduced to servitude by *Montâsem*, the eighth *Khalif*."—(*De Herbelot*.)

fold,

fold, although it be not complete *before* seizin;—but the present case proceeds on the supposition of possession having been taken. If, however, the supervenient deeds of sale or gift, on the part of the purchaser, be rendered null, (as if the *secondary* purchaser should undo the bargain on account of the discovery of a defect,—or, as if the purchaser himself should recede from his gift,) in this case the option of inspection still remains.—This is from *Shimsh-al-Ayma*. It is related, as an opinion of *Abou Yoosaf*, that an option of inspection once annulled cannot again revive, any more than a *conditional* option; and *Kadoore* has adopted this doctrine.

CHAP. IV.

Of Option from *Defect*.

A purchaser, discovering a defect in the article purchased, is at liberty to return it to the seller;

If a person purchase and take possession of an article, and should afterwards discover it to have been defective at the time of sale, it is at his option either to take it for the full price, or to reject it; because one requisite, in an unconditional contract [of sale,] is that the subject of it be free from defect;—when, therefore, it proves otherwise, the purchaser has no option; for if the contract were obligatory upon him, without his will, it would be injurious to him. He is not, however, at liberty to retain the article, and exact a compensation, on account of the defect, from the seller; because, in a contract of sale, no part of the price is opposed to the *quality* of the article;—and also, because the seller does not consent to be divested of the property for

for a less price than that which he stipulates:—if, therefore, the purchaser were to retain the defective article, and exact a compensation from the seller on account of the defect, it would be injurious to the latter:—but it is possible to obviate the injury to the purchaser without entailing an injury on the seller, by permitting him either to retain the article, if he approve of it with the defect, or to reject it.—If, however, the purchaser, at the time of sale, or of taking possession, be aware of the defect, and nevertheless knowingly and wilfully make the purchase, or take possession, no option remains to him; because when he thus purchases or takes possession of the article, it is evident that he assents to the defect.

unless he was aware of the defect before-hand.

WHATEVER may be a cause of diminishing the price amongst merchants is considered as a defect; because injury is occasioned by deficiency in point of value; and deficiency in point of *value* occasions deficiency in *price*; and the mode of ascertaining this is by consulting merchants who are practised in estimating the value of articles.

Whatever tends to depreciate an article is a defect.

A DISPOSITION to abscond, or to make urine upon carpets, or to commit theft, are defects in children during their nonage, but not after they attain to the age of maturity. If, therefore, any of these defects appear in an infant slave during childhood whilst in the hands of the seller, and afterwards appear in him during childhood whilst in the hands of the purchaser, he [the purchaser] is in that case at liberty to return him to the seller, in virtue of *option from defect*; because this is the same defect that existed whilst in the possession of the seller. If, on the other hand, any of these defects should occur in him, in the purchaser's hands, after he attains to maturity, the purchaser is not at liberty to return him by *option from defect*; because this defect is different from that which appeared during childhood in the hands of the seller, since these effects proceed from different causes in the periods of childhood and maturity; for the making of urine upon a carpet

Defects incident to children affect the sale of a slave during infancy, but not after maturity.

carpet (for instance) during the time of childhood, is owing to a weakness in the bladder,—whereas, after maturity, it arises from a disease in the interior parts; and, in the same manner, the *running away* of a child is from a desire of play; and the commission of theft from *thoughtlessness*; but these, where they occur after *maturity*, are the effect of *innate wickedness*.—By a *child* is here meant one in its *perfect senses*; for a child not in its perfect senses is incapable of *running away*; whence it is that the term used in that case is *lost* or *strayed*, not *absconded*:—the running away, therefore, of such a one is not a *defect*.

Lunacy operates as a perpetual defect, provided it ever occur after the sale.

MADNESS during infancy operates as a perpetual defect:—in other words, if an infant slave be subject to lunacy in the hands of the seller, and the lunacy recur whilst in the hands of the purchaser, whether during childhood or after maturity, the purchaser is at liberty to return him to the seller; because this madness is in effect the same as had originally existed whilst the slave was yet in the seller's hands, as being occasioned by the same cause, namely, an internal malady.—It is not, however, to be understood (as some have imagined) that the return of the madness is not required as a condition to enable the purchaser to dissolve the bargain; for GOD Almighty, as being all powerful, may remove the madness, although that seldom happen. Hence it is necessary that the madness return, to enable the purchaser to dissolve the bargain; for, unless it actually return, he has not this privilege.

Defects which operate in the sale of female slaves, but not of males.

A BAD smell, from the breath or armpits, is a defect in regard to *female* slaves, because in many instances the object is *to sleep* with them; and the existence of such defects is a bar to the accomplishment of that object.—These, however, are not defects with regard to *male* slaves; because the object, in purchasing them, is merely to use their services; and to this these defects are not obstacles, since it is possible for a slave to serve his master without the necessity of the master's sitting down with

with him, so as to receive annoyance from these defects.—If, however, they proceed from disease, they are considered as defects with regard to *male* slaves also.

WHOREDOM and *bastardy* are defects with regard to a *female* slave, but not with regard to a *male*; because the object, in the purchase of a *female* slave, is cohabitation and the generation of children, which must be affected by either of the above circumstances; whereas, the object in the purchase of a *male* slave is the *use of his services*, the value of which is not depreciated by his committing whoredom.—If, however, a male slave be *much addicted* to whoredom, our lawyers are of opinion that it is a defect, because in the pursuit of women he neglects the service of his master.

INFIDELITY is a defect in both a male and female slave*; because the disposition of a *Mussulman* is averse to the society of infidels; and also, because as, in the expiation of murder, the emancipation of an infidel slave does not suffice, it follows that the possession of such a slave is not what is desired, since a part of the object is thus defeated. If, on the contrary, a person should purchase a slave, on condition of his being an *infidel*, and he afterwards prove a *Mussulman*, the purchaser has no power of dissolving the bargain, since the exemption from infidelity is no defect.

Infidelity is a defect in both male and female slaves.

A TOTAL suppression of the courses, or an excessive evacuation of them, are defects with respect to a female slave, as they proceed from internal maladies. It is to be observed, however, that the want of the courses is not considered as a defect until the extreme period of maturity be elapsed, which in *females* (according to *Haneefa*) is *seventeen years*; and this knowledge must be had from the information of the

Constitutional infirmities are defects in a female slave.

* That is, supposing the slave to be purchased as a *Mussulman*, and he prove to have been an infidel at the time of purchase.

slave herself.—If, therefore, a person purchase a female slave arrived at full maturity, (that is, seventeen years of age,) and learn from herself that her courses have not appeared, he is then entitled to return her to the seller before taking possession; and even *after* taking possession, provided the seller simply deny the circumstance, and refuse to confirm it with an oath. If, however, the seller deny the circumstance upon oath, the purchaser is not entitled to return her.

A purchaser is entitled to compensation for a defect in an article where it has sustained a further blemish in his hands; but he cannot, in this case, return it to the seller.

If an article, after being sold, should receive a blemish in the hands of the purchaser, and the purchaser should afterwards learn that it had also a blemish at the time of sale, he is, in that case, entitled to receive from the seller a compensation for the defect; but he is not permitted to return it to him, as that would be attended with an injury to the seller, since it would necessitate him to receive again into his property a thing with *two* blemishes which, in issuing from him, had only *one*. As, therefore, the return of the article is in this case impracticable, and as it is necessary to remove injury from the purchaser, the expedient of entitling him to a compensation from the seller for the defect has been devised: unless, however, the seller should consent to receive it with the two blemishes, and voluntarily acquiesce in his own loss.—By the phrase *compensation for defect*, is to be understood, throughout this work, the difference between the value of an article in its *perfect* state, and the value it afterwards bears in its *defective* state.

A purchaser is entitled to compensation for a defect discovered after the article has been cut up.

If a person purchase *cloth*, and cut it up, and then, before he had begun to sew it, discover it to be defective, he is in this case entitled to a compensation for the defect from the seller; because although, in consequence of the cloth being cut, a bar be opposed to the returning of it to the seller, (as the cutting is a defect which the purchaser himself is the occasion of,) yet the return is eventually possible, by the seller's acquiescing in it, which he may do if he please, since

since the bar is opposed only in tenderness to his right; and this right it is in his power to forego. If, however, after cutting the cloth, the purchaser should sell it to another, he is not then entitled to any compensation for the defect; for, although, after cutting the cloth, the bar to his returning it to the seller may be eventually removed, by his [the seller's] acquiescence, yet when the purchaser afterwards disposes of it to another, he himself fixes a bar to the possibility of its being returned to the seller, for which reason he is not entitled to a compensation for the defect.

unless, after cutting, he put it out of his power to restore it to the seller:

IF a person purchase cloth, and, after cutting, either dye it or sew it,—or purchase flour, and mix it up with oil,—and afterwards discover the article to be defective, she is in that case entitled to a compensation for the defect; because the return of the article to the seller is in either of those instances impracticable, as it has become implicated with a thing which cannot be separated; it is therefore impossible to return the article simply *by itself*; nor can it be returned *with the addition*, since the addition was not in any respect a subject of the sale; and the seller, moreover, is not at liberty to receive it back with such addition, because the obstacle to the return, in these instances, is not in right of the *seller*, but in right of the *LAW* *. If the purchaser, therefore, in any of these instances, should sell the article, after discovering it to be defective, he is still entitled to a compensation from the seller; because, as the bar to his returning the article to him existed previous to the sale of it on *his* part, he cannot by such sale be considered as the cause of detaining it from the seller.

or, if the return be rendered impracticable by any change wrought upon the subject prior to the sale, he is entitled to a compensation for defect, notwithstanding the sale of it.

IF a person purchase cloth, and cut it out for clothing on account of an infant son, and after having sewn it up discover a defect in it, he is not entitled to a compensation for the defect from the seller. If,

Appropriation of a purchase to the use of an infant (implied

* Because the *LAW* (meaning the text of the *Koran*) forbids *usury*, under which head this transaction falls, as being the receipt of an *addition*, with the *original*.

in any act concerning it which has a reference to the infant) by precluding a return to the seller, leaves the purchaser no right to compensation for a defect.

however, the son in this instance be an adult, the purchaser is entitled to such compensation.—The reason of this distinction is that, in the former instance, the right of property, with regard to the infant, takes place immediately on the cutting of the cloth, and *previous* to its being sewn; and consequently, as the purchaser by this act invests the infant with a right of property immediately upon cutting the cloth, he becomes the cause of the detention of it from the seller previous to its being sewn, and is therefore not entitled to the compensation:—in the *latter* instance, on the contrary, the right of property with regard to the *adult* does not take place upon the sewing, nor until he actually *take possession* of the garment; and hence, as it is by the *sewing*, and not by the *investiture in the adult*, that the return of the cloth to the seller becomes impracticable, it follows that the purchaser, by making this investiture, does not detain the cloth from the seller, and consequently, that he is entitled to a compensation *.

The purchaser of a slave is entitled to a compensation for defect, after the death or emancipation of the slave:

If a person purchase a slave, and afterwards emancipate him,—or the slave die in his hands, and the purchaser then become acquainted with his having been defective, he is in either case entitled to a compensation from the seller:—in case of the slave *dying*, because death renders his property in the slave complete and perfect, and the impracticability of returning him does not arise from any act of the *purchaser*, but from an unavoidable calamity;—and also in case of his emancipating the slave, upon a favourable construction of the law — Analogy would suggest that in this last case the purchaser is not entitled to a compensation, because the obstacle to the return proceeds, in this instance, from the act of the purchaser: the case, therefore,

* As an infant is incapable of taking possession in a case of *gift*, the property vests in him immediately on the declaration of the donor, or on his [the donor's] performing some act which manifests his intention, as in the cutting of the cloth by the purchaser in the above case: in the case of an *adult* person, on the contrary, *actual seizure* is requisite to an investiture with right of property.

is the same as if he had *killed* the slave; and as, in that case, he would not have been entitled to any compensation for defect, so in this instance likewise. He is, however, so entitled, upon a favourable construction, because by the emancipation his property attains to its height and completion; for MAN is not, in his original nature, a subject of property, all men being originally created free; nor can any right of property exist with respect to him but under restriction, and of limited duration, continuing in force no longer than until he be made free: emancipation, therefore, like death, occasions a completion of right of property, and it may consequently be said that a right of property still remains in the subject of the sale, notwithstanding the impossibility of returning it, as a thing is rendered fixed and unalterable by its completion.—It is to be observed that constituting the slave a *Modabbir* or an *Am-Invalid* is, in this particular, equivalent to *emancipation*.

If a person purchase a slave, and afterwards emancipate him in return for property *, and then discover him to have been defective, he is not entitled to a compensation from the seller, as the detention of the *return* is, in effect, a detention of the *consideration*.—It is recorded, from *Haneefa*, that the purchaser is in this case also entitled to a compensation; because an emancipation, whether it be gratuitously made or otherwise, occasions the completion of the right of property.

but not after the *emancipation*, where it has been granted in return for property.

If a person purchase a slave; and afterwards put him to death, and then discover him to have been defective, he is not entitled to a compensation for the defect, according to *Haneefa*.—This also is agreeable to the *Zâbir-Râwayet*.—It is reported, from *Aboo Yoosaf*, that the purchaser is entitled to a compensation; because the law annexes

nor after his *death*, where he has been slain by the purchaser.

* See *Manniffon* for a Compensation.

no worldly punishment to the murder of a slave by his master*, and the case is therefore the same as if he had died a natural death. The principle on which the *Zâbir-Râwayet* proceeds is that *murder*, wherever it takes place, occasions responsibility; and as, in the case of a master killing his slave, the responsibility is remitted only on account of the master's right of property, the master consequently, as it were, takes the responsibility † in return for his right of property: the case is therefore the same as if he had *sold* the slave. It is otherwise where he emancipates him without any return, as that act does not occasion responsibility, any more than where a poor person emancipates his portion in a *partnership* slave ‡.

A purchaser of food is not entitled to a compensation for defect after having eaten it;

If a person purchase any articles of food, and eat them, and be then informed of a defect in them, in that case, according to *Haneefa*, he is not entitled to any compensation from the seller.—According to the two disciples he is entitled to a compensation.—The same difference of opinion subsists with respect to the case of a person who, having purchased garments, and worn them until they had become ragged, then discovers that a defect had formerly existed in them.—The arguments of the two disciples are that the purchaser having performed no act with respect to the subject of the sale but what is agreeable to the object of the purchase, and what is customary, the case is therefore the same as if he had emancipated a slave.—The argument of *Haneefa* is that the return of the food to the seller is impracticable, because of the purchaser having performed an act with regard to it which induces responsibility; and the case is therefore the same as that of sale or of murder. The act of a purchaser, moreover, although it be the object of the purchase, is nevertheless disregarded: whence it is that the purchaser is entitled to no compensation for a

* That is, it only subjects the murderer to expiation by charity, fasting, or other religious penances.

† In other words, "bears the loss."

‡ See Vol. I. p. 440.

defect.

defect, after having sold the goods, notwithstanding *sale* be one of the objects of *purchase*.

If a person purchase certain articles of food, and eat part of them, and then discover them to be defective, he is not, according to *Hanefah*, entitled to return to the seller what remains, and to demand from him a compensation for the defect in what he had eaten; because provisions are in the nature of an unity; and the case is therefore the same as if a person were to sell part of goods purchased by him, and then to discover a defect in them; in which case he would not be entitled to return the remainder to the seller, and demand a compensation for the defect; and so also in the case in question.—There are two opinions of the two disciples on this case.—According to one opinion, the purchaser may retain the remaining part of the provisions, and receive from the seller a compensation for the defect of the whole: and, according to the other, he may return the remaining part to the seller, and receive a proportionable compensation for the defect of what he had eaten.

and so also,
after having
eaten only a
part of the
food.

If a person purchase eggs, musk melons, cucumbers, walnuts, or the like, and after opening them discover them to be of bad quality; in that case, if they be altogether unfit for use, the purchaser is entitled to complete restitution of the price from the seller, as the sale is invalid, because of the subject of it not being in reality *property*.—If, on the other hand, notwithstanding their badness, they be still fit for use, the purchaser is not entitled to return them to the seller, because the opening of them is an additional defect of his own creation: he is, however, entitled to a compensation for the defect; as by this means the injury he would otherwise sustain is remedied to the greatest possible extent. *Shafet* has said, that he is entitled to return them after opening them; because that is the exercise of a power committed to him by the seller. In reply to this our doctors argue, that the seller has empowered him to open them in virtue of his becoming the proprietor.

Case of de-
fect in very
perishable
commodities.

proprietor. Hence the case is the same as where a person purchases a garment, and, after having cut it, discovers a defect in it; in which case the purchaser is not entitled to return the garment upon the seller's hands, although he [the seller] had authorized him to cut it down.—In short, if the articles prove defective only in a *small part*, the sale is valid, upon a favourable construction, because it is incident to walnuts, and such other articles, to be bad in a *small part*; (by a small part is meant what is *commonly* the case, such as one or two in a hundred :) but if, on the other hand, a *great part* prove bad, the sale is invalid, and the purchaser is entitled to a complete restitution of the purchase-money; because in this case the seller has united together entities and non-entities with regard to value; and the case is therefore the same as if a person were to sell together *freemen and slaves*.

Case of a purchaser selling what he has purchased, which is afterwards returned to him in consequence of a defect.

If a person, having purchased a slave, should sell him to another, and that other return the slave to him on discovering him to be defective, and he agree to receive him back, on the *Káree's* issuing a decree to that effect, founded on the proof of the defect by witnesses, or on the refusal of the first purchaser to confirm his denial upon oath, —in that case the first purchaser is entitled to return the slave to the seller; because, although it be not lawful for a purchaser, after the sale of the article on his part, to return it to the seller, still in this case, the second sale having been annulled by the *Káree*, it becomes the same as if no such sale had ever existed.

OBJECTION.—As the first purchaser denied the defect, and obliged the second purchaser to establish the fact by witnesses, it would appear that he is not entitled to return the slave; because, if he ground his right on the defect, he is guilty of prevarication, since he first *denies* the defect, and then *asserts* it.

REPLY.—The disproof of the denial by the *Káree's* decree, founded on the proof of the fact by witnesses, renders such denial of no validity in law; hence the apparent contrariety of his denial and
assertion

assertion is reconciled, and as the first sale continues in force, and the defect is at the same time proved, it follows that he is entitled to return the slave to the seller.—If, therefore, he chuse to return him, it is a valid rejection:—but if he should rather chuse to keep him, the sale continues in force.—It is otherwise where an *agent for sale* disposes of an article, and the purchaser returns it to the agent in consequence of a defect;—for this is in reality a return to the *constituent*; and the agent is not required to return the article to his constituent, because, in this case, there is only *one* sale, whereas in the case in question there are *two*, whence the dissolution of the *second* sale does not dissolve the *first*.—In short, if the *second* purchaser, on the discovery of a defect, return the slave, and the first purchaser receive him back, in consequence of a decree of the *Kázee*, he [the first purchaser] is in that case entitled to return him to the original seller.—If, on the other hand, the first purchaser agree to receive him back without a decree of the *Kázee*, he in that case is not entitled to return him to the original seller, because, although the second sale be annulled with regard to himself and the second purchaser, still it is equivalent to a sale *de novo* with regard to all *other* persons; and the original seller is *another* person.—It is recorded, in the *Yama Sagbeer*, that when the subject of the sale is returned to the first purchaser, *without* a decree of the *Kázee*, on account of such a defect as *very rarely* happens, (such as an *additional finger*, for instance,) the first purchaser has not the power of returning it to the original seller; and this (as our author remarks) is a direct proof that the effect is the same in both cases; that is, whether the defect be of such a nature as may have recently happened, or such as never recently happens.—In some traditions it is mentioned, that in the latter case the purchaser may return the subject of sale to the original seller, as there is then a certainty that such defect *did* exist whilst in the hands of the original seller.

Conduct to be observed by the magistrate, in case of a purchaser, after taking possession, alleging a defect in the article.

If a person purchase a slave, and take possession of him, and then assert a defect in him, the *Kázee* in such case must not enforce the payment of the price on the part of the purchaser until he shall have investigated his assertion, either by the declaration of the seller, upon oath, that the slave had no defect, or by the proof of the fact on the part of the purchaser by witnesses. The suspension of the *Kázee's* decree with regard to the payment of the price is requisite, lest such decree should be rendered vain and useless by the subsequent proof of the defect; and also, because the tenor of such decree is that the purchaser shall pay the complete price in fulfilment of the specific claim of the seller,—whereas the purchaser, by asserting a defect, denies the obligation on him to pay the complete price. The *Kázee*, therefore, must first proceed to examine into the circumstance of the defect; and if the purchaser should say that his witnesses are in *Syria**, he must then exact from the seller his denial upon oath. If the seller should take the oath accordingly, the *Kázee* must then decree the payment of the price;—because in suspending the price till the arrival of the witnesses an injury would result to the seller; and the immediate enforcement of the payment does not in so great a degree injure the purchaser, because after the return of the witnesses from *Syria*, if he should establish his proof, the purchase-money will be returned to him on his returning the slave to the seller.—If, however, the seller should refuse to take an oath in support of his denial, the assertion of the purchaser is then established, as such refusal is an argument in favour of the existence of the defect.

Case of a purchaser alleging the existence of a defective property before he had made the purchase;

If a person, having purchased a slave, should afterwards assert that “he had run away from him, and had also run away whilst in the possession of the seller,” and the seller offer to take an oath that “he had never run away from him” [the purchaser,] the *Kázee* must in that case refuse to receive his deposition, until the purchaser first

* That is, at such a distance as renders their appearance in court impracticable.

prove

prove by witnesses that "he had run away from *him*" [the seller, after which the *Kdsee* must tender an oath to the seller to this purport, "by God, I have sold the said slave and delivered him to the purchaser, and he never ran away *whilst he belonged to me*:" (as is mentioned by *Mohammed* in the *Yama*:)—or to *this* purport, "by God, the purchaser has no right to return to me such slave, on account of the defect which he asserts:"—or in this manner, "by God, such slave never ran away whilst he belonged to me."—He must not, however, tender an oath to him to *this* purport, "by God, I sold the said slave at a period when he had not the said defect:"—nor in *this* manner, "by God, I sold the said slave and delivered him to the purchaser, at a period when he had not the said defect;"—because, in taking such oaths, the meaning of the seller may be, that "although he *had* such a defect *formerly*, yet he had it not *at the identical period of sale or delivery*;" and thus, without any deviation from truth, he may defraud the purchaser of his right. If the purchaser should not be able to prove, by witnesses, that the slave had run away from him [the purchaser,] the oath, in that case also, (according to the two disciples,) must be tendered to the seller.—Our modern doctors have differed concerning the opinion of *Haneefa* upon this point; as some of them say that, according to him, an oath is not to be administered to the seller in this instance.—The argument of the two disciples is, that as the assertion of the plaintiff is worthy of regard, and such as would be attended to in case of its being proved by witnesses, it follows that in default of such witnesses the seller must be required to deny the assertion upon oath.—The reasoning of *Haneefa* (as recorded by those who have said that, according to him, an oath is *not* to be administered to the seller) is that the form of swearing a defendant has been ordained by the LAW for the purpose of removing any litigation that may happen to arise,—not for the purpose of *exciting* litigation. Now, in the present case, the exaction of an oath from the seller will only give birth to a new litigation; because, in case he should refuse to take it, and the proof of the fact be

and the forms of deposition to be required of the seller in this instance.

thence established, it will become a new subject of contention whether the said defect did exist or not during his being in the seller's possession, and there will be a necessity for tendering to him another oath, upon this point, for the purpose of removing this fresh cause of dispute.

If a person purchase a *female* slave, and having received her from the seller, should, on the discovery of a defect, desire to return her, and the seller assert that "he had sold *two* female slaves to the purchaser of which he only produced *one*," and the purchaser maintain, on the other hand, that "he had only sold *one*,"—in that case the declaration of the purchaser, upon oath, is to be credited; for, as the disagreement here relates to the *quantity* taken possession of, the person who *took possession* must be credited, as being the most competent judge;—in the same manner as holds in a case of usurpation;—that is, if the person whose property is usurped assert the usurpation of a *particular quantity*, and the usurper deny the quantity, his declaration upon oath is to be credited;—and so also in the case in question. If, on the other hand, the purchaser and seller agree in the extent of the *sale*, but differ with respect to that of the *seizin*, (as if both should allow the two female slaves to have been the subject of the *sale*,—the seller asserting that "the purchaser had received *both*," and the purchaser, on the other hand, maintaining that "he had only received *one*,")—in that case also the declaration of the purchaser, upon oath, is to be credited, for the reason already explained.

Case of a person purchasing *two* slaves, one of whom proves defective.

If a person purchase two slaves by one contract, and take possession of one, and then discover the other to be defective, he is not in that case permitted to retain the one he had taken possession of, and to relinquish the other; but he has the option of either retaining or relinquishing both; because until both be taken possession of the terms of the contract are not fulfilled; and hence, if he should retain one and relinquish the other, it would induce a deviation from the bargain

bargain previous to its fulfilment, which (as was before explained) is unlawful. If the defect should lie in the slave of which possession had been taken, in that case there is a disagreement among our doctors. It is recorded, from *Abou Yoosaf*, that the purchaser is in such case entitled to return the *defective* slave only. The more approved doctrine, however, is that he must retain both or relinquish both; because the fulfilment of the bargain rests upon a complete possession of the subject of the sale, namely the *two slaves*. This case, therefore, resembles a case of detention of the article sold, in satisfaction for the price: that is, if the seller should detain the goods in satisfaction for the price, such detention cannot be abrogated until he actually receive complete possession of the price; and in the same manner, in the case in question, the bargain is not perfected, until the purchaser receive complete possession of the articles sold. If, however, in the case in question, the purchaser should have made seizin of both, and should afterwards discover a defect in one of them, he is then entitled to return the defective one *singly*. *Ziffer* has given a different opinion; because in this case a deviation from the bargain takes place; and it is not free from injury, since it is an established custom, in sales, to unite good and bad things together: the case is therefore the same as if he had rejected one before the seizin of the whole,—or, as if he had made the purchase under a condition of option, or, with an option of inspection. Our doctors, on the other hand, allege that in this case the deviation from the bargain takes place *after* the fulfilment of the contract; because the seizin of the goods renders the contract complete; and the existence of the option of defect does not operate against the completion of the contract after seizin. A deviation, moreover, from the bargain, after the fulfilment of it, is lawful, as has been already demonstrated: whence it is that if, after taking possession of both slaves, one of them should be found to be the property of another, the purchaser is not in that case at liberty to return *both* to the seller; but must retain one, and receive from the seller a deduction of the price, on account of the one belonging to another, notwithstanding

ing this be a deviation from the bargain:—contrary to *conditional options*, or *options of inspection*, for the existence of such conditions is a bar to the fulfilment of the bargain, notwithstanding seizure may have taken place.

In the purchase of articles of weight, or measurement of capacity, the part which proves defective may be returned to the seller.

If a person purchase articles estimable by *weight*, or by *measure of capacity*, (such as silver or wheat, for instance,) and he afterwards discover the article to be in part defective, he is entitled, in that case, either to return the whole to the seller, or to retain the whole; but he has not the power of returning the *defective* part only, because the unities of articles estimable by weight or by measure of capacity are considered as forming one individual, provided they be all of the *same species*. Some have alleged that this proceeds on a supposition of the articles in question being contained in one vessel; but that, if they be contained in *two*, the one containing the defective article may be returned, and the other retained.

If a part of such articles prove the property of another, still the purchaser is not at liberty to return the remainder.

If, after the purchase of articles estimable by weight, or measurement of capacity, a part of them should prove to be the property of another, the purchaser is not in that case allowed to return the remainder to the seller; because no injury can result to him from his being obliged to keep them, as articles of this nature may be separated and divided without sustaining any blemish, and the proof of part of the subject of the sale having been the property of another is no impediment to the completion of the contract, since that depends on the consent of the *seller* and *purchaser*, and not of the person who is discovered to be the proprietor of a part. This is where possession has been taken by the purchaser, *before* a part of the subject is discovered to be the right of another;—for if the right of property of the other be discovered previous to the purchaser taking possession, he is, in that case, entitled to return the remainder, since a deviation from the contract takes place previous to the completion of the bargain. If the articles be not such as are estimable by weight, or measurement of capacity,

capacity, but *clotb*, for instance, then the purchaser is entitled to return the remainder to the seller at all events, as division and separation of the article would, in this instance, prove an injury to it.

If a person purchase a female slave, and discover that she has an *ulcer* or some other such ailment, and apply a remedy to it,—or, if a person purchase an animal, and discover it to be defective, and ride upon it on some business of his own,—the application of a remedy in the one case, or the act of riding in the other, indicate an acquiescence in the defect on the part of the purchaser, and he is therefore not entitled to return either the slave or the animal on the plea of an option from the discovery of a defect. It would be otherwise if he had purchased the animal on a *condition of option*; for the object of such condition is an *experimental knowledge*, which cannot be obtained but by a *trial*. If, moreover, he were to ride upon the animal, *not* on his *own* business, but merely with an intention of restoring it to the seller, no inference could be drawn of his acquiescence in the defect;—and so also, if he were to ride upon the animal with an intention of giving it *water* or *forage*; provided, however, the riding for these purposes be unavoidable, either because of the animal being unruly and ungovernable, if not mounted, or because of the purchaser himself being incapable of walking.

A purchaser, by applying a remedy to the defective article, or making use of it, deprives himself of the power of returning it to the seller.

If a person purchase and take possession of a slave, not knowing that he had formerly, whilst in the possession of the seller, been guilty of theft, and the theft be afterwards proved, and the slave suffer amputation for it in the seller's hands, the purchaser is, in that case, entitled, according to *Haneefa*, to return him to the seller, and receive back the whole of the price. According to the two disciples, the purchaser is still to keep possession of the slave, and to receive from the seller the difference between the value whilst in his perfect state, and that which he bears after his hand is cut off. The same disagreement subsists in case of a slave suffering death whilst in the possession

If a purchased slave suffer amputation for a theft committed with the seller, the purchaser may return him and receive back the price:

and so also, if he suffer death, for a

of

crime committed with the seller.

of the purchaser, for a crime he had committed whilst in the possession of the seller; *Haneefa* being of opinion that the purchaser is entitled to a restitution of the whole of the price; and the two disciples, that he is entitled only to the difference between the value of the slave, *before* his blood has become neutral, and that which he bears after it has been neutral*. In short, according to *Haneefa*, the existence of a cause of mutilation or death is equivalent to a *claim of right* †,—whereas, according to the two disciples, it is equivalent to a *defect*. The reasoning of the two disciples is that the *cause* only of mutilation or death occurred with the seller, but not the actual death or mutilation itself;—now the existence of a cause of death or mutilation is not repugnant to the subject being *property*; the slave, therefore, notwithstanding the existence of the *cause* of mutilation or death, is nevertheless property, and capable of being the subject of a sale; as, however, a slave in whom exists a cause of death or mutilation is *defective*, it follows that the purchaser is entitled to receive from the seller a compensation for the deficiency, where the return has become impracticable; and in either of these instances the return *is* impracticable;—where he suffers death evidently; and also where he suffers mutilation; because such mutilation is a defect that has taken place in the hands of the purchaser;—in the same manner as where a person purchases a pregnant female slave, being ignorant of the circumstance, and the slave dies in labour, in which case the purchaser is entitled only to a compensation for the difference between the price which she bore when not pregnant, and that which she bore when pregnant. The reasoning of *Haneefa* is, that the *cause* of mutilation and death occurred with the *seller*; and as a cause induces its effects, the death or mutilation must be referred to the period of the *cause*. The case is, therefore, the same as if a person

* That is, has become forfeited to the LAW, and consequently liable to be seized without responsibility.

† In other words, is the same, in effect, as if the slave, after the purchase, should prove to be the property of another person.

were to usurp a slave, and the slave, whilst in his possession, were to commit a crime inducing mutilation or death, and the usurper then restore him to his proper owner; and the slave then suffer death or mutilation; for in that case the usurper would be responsible for the *whole* of the value to the owner; in the same manner as he would have been in case of the slave's having been put to death whilst in his own possession; as the cause, in either instance, occurred with him. With respect to the case of pregnancy, adduced by the two disciples, it is not admitted by *Haneefa*. If, however, it were admitted, still there is no analogy between it and the case in question, since pregnancy is the cause of *delivery*, and not of *death*, except in a few instances.

If a slave first commit theft with the seller, and then, after being sold, commit theft with the purchaser, and afterwards suffer amputation for both thefts, in that case, according to the two disciples, the purchaser is entitled to the difference of relative value of the slave at the time of sale, and after the commission of the second theft. According to *Haneefa*, on the other hand, the purchaser is not entitled to return him, unless the seller should of his own accord consent to receive him: but he is entitled to a compensation for the fourth of his value; and if the seller should himself agree to receive him, in that case he must restore to the purchaser three fourths of his price; because the *hand* of a man is esteemed equal to half his person; and as, in this case, the hand is forfeited for the commission of *two* thefts, it follows that a deduction of one quarter ought to be made on account of the theft committed whilst in the possession of the *purchaser*.

Case of a slave suffering amputation for *two* thefts, one committed with the *seller*, and the other with the *purchaser*.

If a slave, having been severally sold, and delivered to three different persons, should then suffer amputation for a theft which he had committed whilst in the possession of the first seller, and of which the different purchasers were not apprized at the period of concluding

Case of a slave, after being *thrice* sold, suffering amputation for a theft

committed
with the first
seller.

their respective contracts,—in that case, according to *Haneefa*, the last purchaser has a right to return him for a full retribution of the price to the person from whom he bought him; and he again is entitled to return him, on the same condition, to the person from whom he bought him; and in this manner the return may be made through the different gradations of purchasers to their immediate sellers, until at length the slave be returned to the seller in whose hands he committed the theft;—in the same manner as in a case of *claim of right*; for the existence of a *cause* of amputation is (according to *Haneefa*) equivalent to a *claim of right*, as was before explained*. According to the two disciples, on the other hand, the last purchaser is entitled to a compensation from the *immediate seller*; but he again is not entitled to any compensation from *his* immediate seller; in the same manner as in a case of *defect*; for the existence of a *cause* of amputation is (according to *them*) equivalent to a *defect*, as was before explained*.—(It is to be observed that the mention of the purchaser being ignorant of the theft committed by the slave, is insisted on in the two preceding examples, on account of the particular tenets of the two disciples; for as, in their opinion, the existence of a *cause* of mutilation is equivalent to a *defect*, it follows that if the purchaser had previous knowledge of the existence of such cause, he would appear to have acquiesced in the defect, and consequently have relinquished any right to a compensation. As *Haneefa*, on the contrary, holds the existence of a *cause* of mutilation to be equivalent to a *claim of right*; and as the knowledge or ignorance of this circumstance makes no difference with respect to the purchaser, it follows that such specification, with regard to *his* tenets, is perfectly immaterial.)

Where the
purchaser
grants the
seller an ex-
emption from

If a person should sell a slave, stipulating an exemption to himself of all responsibility for his defects, as if he should say, “I have sold “this slave with all his defects,”—in that case, if the purchaser ac-

* See p. 224.

quiesce

quiesce in such condition, and exempt him from any responsibility, he is not afterwards permitted to return him to the seller on account of any defect, notwithstanding the condition of the seller may have been *general*, that is, without specifying the particular names of the defects from the responsibility of which he exempted himself.—*Sbafci* is of opinion that such exemption is not valid, unless the name of every defect to which it refers be specified;—for it is a rule, with him, that exemption from undefined claims is invalid; because *exemption* has some of the properties of *investiture*, (whence it is that it may be rejected,) and investiture of an undefined nature is invalid. The argument of our doctors is that the grant of such exemption is in fact a voluntary surrender of one's own right, the uncertainty with respect to which can be no cause of contention, since delivery is not requisite. It is to be observed that *Abou Yoozaf* is of opinion that the exemption, in this case, includes all defects actually existing at the time of sale, and also all which may happen in the interval between that and their delivery. *Mohammed* and *Ziffer*, on the contrary, are of opinion that the defect which may happen in the interval ought not to be included. The argument of *Abou Yoozaf* is that the probable object of such surrender on the part of the purchaser is to render the sale *binding* and *conclusive*, which would not be the case unless the defects that may happen in the interval between the sale and the seizure were also included.

defect, he cannot afterwards return the article, whatever the defects in it may be.

C H A P. V.

Of Invalid, Null, and * Abominable Sales.

A SALE is INVALID where it is lawful with respect of its ESSENCE, but not with respect of its QUALITY; and NULL, where the subject is not of an appreciable nature; and the terms INVALID and NULL, are often indiscriminately used.—An ABOMINABLE sale is such as is lawful both in its ESSENCE and QUALITY, but attended with some circumstance of ABOMINATION.

Distinctions
between a
null and an
invalid sale.

A SALE in exchange for *carriage, blood*, or the person of a *freeman*, is null, because none of these cases bears the characteristic of sale, (namely, an *exchange of property for property*,) since these articles do not constitute property with any person. A sale in exchange for *wine* or *pork* (on the other hand,) is merely *invalid*; because the characteristic of sale does exist in these instances, as these articles are considered as property with some descriptions of people, such as *Christians* and *Jews*; but they do not constitute property with *Mussulmans*, and a contract comprehending these articles is therefore invalid.

The property
purchased
under a null

IN a sale that is null, the purchaser is not empowered to perform any act with respect to the subject of the sale, but it remains as a

* The word in the original is *Makrooh*, which the translator (following its literal and common acceptation) has rendered *abominable*. The term, however, in this work, is not to be understood in the ill sense in which it is generally employed in the English language; the cases to which it relates being such as are in every respect legal, but which being attended with circumstances of impropriety, an abstinence from them is recommended.

trust

trust in his hands, according to some of our modern doctors; because, as the *contract* of sale, in such an instance, is totally disregarded, there remains only the seizure of the *purchaser* with the consent of the *seller*: and accordingly, if the article were to perish in the purchaser's hands, in this instance, he is not responsible for it. Others are of opinion that the subject of the sale, in this case, is not a *deposit*, but that the purchaser is not responsible for it;—(in other words, if it perish in the purchaser's hands, he is answerable;)—because the article is as much in his possession, in this instance, as an article detained in a person's hands with an *intention* of purchase, and for which he is responsible. Some allege that *Haneefa* is of the *first* opinion, and the two disciples of the *second*. The reasons for this difference of doctrine will be explained in treating of the decease of an *Am Walid* or *Mudabbir*, in the hands of a purchaser.

sale is merely a *trust* in the purchaser's hands:

IN a case of *invalid* sale, the purchaser becomes proprietor of the article upon taking possession of it; and is responsible for it [if it be lost in his hands.] *Shafei* is of a different opinion, as will be hereafter explained.

but that purchased under an *invalid* sale becomes his property.

THE sale of carrion, blood, or the person of a freeman, is null, in the same manner as a sale *in return* for those articles is null; because, as those articles do not constitute property, they are unsaleable.

A SALE of wine or pork, if in return for *money*, is *null*; and if in return for any other article, (as *cloth*, for instance,) it is *invalid*,—whence it is that the seller of pork or wine, for *cloth*, becomes the proprietor of such cloth, although the actual pork or wine do not become the property of the purchaser. The distinction in these cases is, that wine and pork are held by *Zimmies* to be property, whereas *Mussulmans* consider them as articles from which no use can be derived, because the LAW has commanded the contempt of them, and prohibited

A sale of forbidden things, if for money, is *null*; but if in the way of *barter*, is *invalid*.

prohibited all regard to them among *Mussulmans*. Now, a *Mussulman's* purchasing either of these for specie implies a regard to them, because it is not *money* (which constitutes the price) that is the object of the sale, as it is merely the instrument of *acquiring* the object; for in fact it is only the *wine* or *pork* that is the object; and as these articles are not appreciable with respect to *Mussulmans*, it follows that the sale of them is *null*. It is otherwise if a *Mussulman* purchase cloth for pork or wine, because that can admit of no other construction than that he regards the *cloth* as the object of the transaction, considering the pork or the wine only as the means of attaining such object, and not (as in the other case) as the object itself. The specification of the pork or wine, therefore, is regarded merely that the purchaser may become the proprietor of the *cloth*, and not in order that the seller may become proprietor of the wine or pork; and hence the mention of those articles is invalid, and the payment of the *price of the cloth*, and not the delivery of the *flesh* or *liquor*, is incumbent on the purchaser;—(and so also, where a person *sells* wine or pork for cloth;) for, as cloth is a saleable article, the *cloth* must, in this instance, be considered as the subject of the sale; for which reason this is an *invalid* and not a *null* sale; because where, in a contract of sale, the subject on both sides consists of something else than *money*, either may with equal propriety be considered as the subject of the sale. (This species of sale is termed a *Becya Mookáyeza*, or *barter*.)

The sale of a *Modabbir*, an *Am-Walid*, or a *Mokátib* is null;

THE sale of an *Am-Walid*, a *Modabbir*, or *Mokátib*, is null;—because an *Am-Walid* has a claim to freedom, as the prophet has said, “*Her child hath set her free,**” (that is, her child is a *cause* of freedom to her;)—and the cause of freedom, with respect to a *Modabbir*, is not established upon the *decease* of his owner, but must be considered as actually extant in him *at present*, as the owner is incapable of emancipating him *after his decease*;—and a *Mokátib*, on the other

* See Vol. I. p. 479.

hand,

hand, is possessed of his own person as a right established in him, and binding upon his owner, insomuch that the owner cannot of himself break or infringe upon it:—if, therefore, the sale of any of these were valid, that which is established in them would be rendered null;—hence the sale of them is null.—Respecting a case where a *Mokâtib* himself acquiesces in being sold, there are two opinions recorded. According to the *Zabir Rawdyet*, the sale in such case is valid. It is to be observed that by a *Modabbir* is here meant such as is *absolutely* so, and not one whose condition of freedom is restricted to the non-recovery of his master from the illness under which he laboured at the time of granting the *tadbeer* *.

If, after the sale of an *Am-Walid* or *Modabbir*, and the seizure of the purchaser, one or other should die, in this case, according to *Haneefa*, the purchaser is not responsible†. According to the two disciples he is responsible for the value:—(and there is one tradition which reports that *Haneefa* coincides with them on this point.)—The reasoning of the two disciples is, that as the purchaser took possession of the *Modabbir* or *Am-Walid* in virtue of a *sale*, he is therefore responsible for the loss; in the same manner as for the loss of any other property after purchase and seizure;—for this reason, that an *Am-Walid* or *Modabbir* may be included ‡ in a contract of sale; whence it is that any article united with them in a contract of sale becomes the actual property of the purchaser. It is otherwise with respect to a *Mokâtib*, as the purchaser is not responsible for the loss of him, because, being possessed of his own person, the purchaser's seizure of him is not fully established; and the responsibility attaches in virtue of the seizure. The argument of *Haneefa* is, that *actual sale* cannot operate with respect to what is not in reality a fit subject of it;

and the purchaser is not responsible if they die in his hands.

* See Vol. I. p. 477.

† That is, the loss is considered as falling upon the *seller*, and not upon the *purchaser*.

‡ That is, "may be joined with other articles."

and

and as a *Modabbir* or *Am-Walid* are not in reality fit subjects of sale, they are therefore considered in the same light with a *Mokdrib*. In reply to what the two disciples urge it may be observed, that an *Am-Walid* or *Modabbir* are *not* included in a sale for the sake of *their persons*, but only in order that the effect of sale may be established with respect to such articles as may have been united with them in the contract; in the same manner as where property of the *purchaser* happens to be involved in the contract;—in other words, if a person purchase two slaves by one contract, and one of those slaves happen to be his property, such slave is nevertheless included in the contract,—not indeed for the sake of *his person*, but merely in order that the effect of the sale may extend to the *other* slave, who is united with him in it.

The sale is null of fish, in the water,

THE sale of fish which is not yet caught is null, as it is not in that state property.—In the same manner also, the sale of a fish which the vender may have caught, and afterwards thrown into a large fountain from which it cannot be taken without difficulty, is null, because there the delivery is impracticable. (It is lawful, however, in case the fountain be so small as to admit its being caught with ease.)—If fish should of themselves come into a fountain without the proprietor's having taken any means, by the erection of a dam, or the like, to prevent their egress, they are not considered as property, and the sale of them is therefore null.

or of a bird in the air,

THE sale of a bird in the air, or of one which after having been caught is again set at liberty, is null; because in the one case it is not property, and in the other the delivery is rendered impracticable.

or of a fetus in the womb, (or its offspring.)

THE sale of a *fetus* in the womb, or of the offspring of that *fetus*, is null; because the prophet has prohibited it; and also, because there is a probability of fraud, from there being a want of certainty in the case.

THE

THE sale of milk in the udder is null; because there is a possibility of fraud, in the udder's being perhaps void of milk, and full of wind; or, because there might arise a contention with respect to the mode of extracting the milk; or because it might happen that the udder contained more milk at the time of extracting it than at the time of sale; and hence there might be implicated in the sale something not properly the subject of it.

or of milk in
the udder,

THE sale of wool or hair growing upon an animal is null; because, whilst joined to the animal, it is considered as a constituent part of it; and also, because it cannot be exactly cut away from the animal, without either leaving a part of it or taking away part of the skin, since it is not practicable to *pull* it out. It is, moreover, recorded in the *Nakl Sabeeh*, that "the prophet prohibited the sale of "wool upon the animal, of milk in the udder, and of butter in the "milk *." It is recorded of *Abou Yoosaf*, that he admitted the legality of the sale of growing wool: but to this the above tradition is an answer.

or of hair (or
wool) upon an
animal.

It is not lawful † to sell a piece of wood sustaining a weight, such as a *pillar* or a *beam*, although the piece of wood be specified and determinate. Neither is it lawful to sell a yard from a piece of cloth which is sewed, whether the parties specify that the yard shall be cut off from it or not; because in this case a delivery without injury is impracticable. It is otherwise where a person agrees to sell *ten drams* (for instance,) from an ingot of silver, for these may be cut off from the ingot without injury to it. It is to be observed, however, that if the seller, before the dissolution of the contract, should cut off the

The sale is
invalid, of
any article
which cannot
be separated
from its situa-
tion without
injury.

* That is, before it has been extracted by *churning*.

† By the phrase "it is not lawful" is here (and in the following examples) to be understood, "it is *invalid*."

or of which
the quality or
existence can-
not be ascer-
tained,

yard of cloth, or pull away and separate the piece of wood, the sale in that case becomes complete, since the cause of its invalidity is removed. It is otherwise with respect to the sale of the *kernels of dates*, because that continues null, although the stones be afterwards opened and the kernels taken out; since (contrary to the case of the *yard of cloth*, or the *piece of wood*) the existence of them was *originally* uncertain.

It is not lawful for a game-catcher to sell “*what he may catch at one pull of his net* ;” because the subject of the sale is uncertain; and also because the purchaser may be deceived, as it is possible that none may be caught.

or the quan-
tity of which
can only be
judged of by
conjecture,

It is not lawful to sell dates growing upon a tree in exchange for dates which have been plucked, and which are computed, from conjecture, to be equal in point of measurement to those that are upon the tree. This species of sale is termed *Moxábinat* *; and has been prohibited by the prophet, as well as the sale termed *Mobákila*, which is the sale of wheat in the ear, in exchange for a like quantity of wheat by conjecture. The law is the same with respect to the sale of grapes on the vine in exchange for raisins. *Shaféi* holds these sales to be lawful, provided they be not extended to a quantity exceeding five *Wusks* †; because, although the prophet has prohibited a sale by *Moxábinat*, yet he has permitted what is termed *Oráya*; which he explains to be, a sale of dates upon a tree, provided the quantity be less than five *Wusks*, in exchange for a quantity which have been plucked, and which are similar, in point of measurement, according to computation. Our doctors, on the other hand, explain *Oráya* in its

* Properly, a sale without weight or measure.

† *Wusk* literally means a camel's burthen, which is computed to be sixty *saá*. (See Vol. I. p. 44.)

literal sense to mean a *gift*; and the nature of it is this. A person makes a gift of the dates of his orchard to another, who thereupon comes and enters the orchard. This gives disgust to the proprietor, as his family reside in the orchard; but being, at the same time, unwilling to violate his agreement, he prohibits the other from entering into the orchard, and gives him a quantity of dates which have been pulled in exchange for those which were growing in the orchard. This is the proper interpretation of the traditional saying of the prophet, quoted by *Shafei*; and this mode of sale, which is termed *Moo-jár*, is valid in the opinion of our doctors. It is not, however, in reality a *sale*, because the right of property had not vested in the donee, on account of his not having made seizin of the dates, and therefore the dry dates which were afterwards given to him is considered as a *new gift*.

It is not lawful to sell goods by the way of *Molámija*, *Monázibee*, or *Alka Hidgir*;—that is, the *touch* of the goods, the *throwing* of the goods; or the *casting of a stone*;—as where, for instance, a person having exhibited his goods to another, and specified the price, the parties agree between themselves that the contract shall be binding, either on the purchaser's *touching* the goods, or the seller's *throwing* them towards him, or the purchaser's *casting a stone* at them. These modes of sale were common in the days of ignorance: but were inhibited by the prophet.

or where the bargain is determined by the purchaser touching the goods, &c.

It is not lawful to sell grass growing on a common, because it is not the property of the seller; for it is declared in the traditions that “in *grafs* all men are alike sharers;”—(that is, it is *common* to all.) Neither is it lawful to let it out on lease; because, as it is not permitted to farm any thing, where the object is the destruction of it, even though it be the property of the lessor, it is consequently in a superior degree unlawful to let in lease an article of which the property

The sale is invalid, of grass upon a common,

is common to all, where the object of the lessee is the destruction of it *.

or of bees
(unless in a
hive, or with
the comb,)

THE sale of bees is not lawful according to the two *Elders*. *Mohammed* is of opinion that it is lawful, provided the bees be in a place of custody †, and not wild ‡; and such is also the opinion of *Shafei*; because a bee is an animal yielding good; and as we are permitted by the LAW to enjoy the good which that creature yields, it follows that the sale of the animal is permitted. The reasoning of the two *Elders* is that, the animal being of an offensive nature, the sale of it is therefore unlawful, in the same manner as in the case of *wasps*. Besides, the good is derived from its produce, not from its substance, whence no advantage can be derived from it until the honey be produced. If, however, the comb be sold, with the honey in it, and the bees, the sale of the bees is in this case lawful, as a *dependant*. *Koorakbee* is also of this opinion.

or of silk-
worms.

IT is not lawful to sell *silk-worms*, according to *Haneefa*, as they are animals of an offensive nature. *Abou Yoosaf* thinks that if the silk have appeared they may then lawfully be sold, as a *dependant*. *Mohammed* is of opinion that the sale of them is lawful in any case,

* The object of a lease is *usufruct*; or (in the language of the *Mussulman* lawyers) a *destruction of the produce of the thing, but not of the thing itself*: thus if a person should take a lease of a piece of ground, or a fruit tree, he would be entitled to appropriate to himself the produce of the ground, whether grain or grass, or the fruit that might grow upon the tree; but he would have no right to use the ground or the tree (the immediate subjects of the lease) so as to occasion any destruction of their substance. Hence proceeds the illegality of a lease of a field of grass, of grain, of the fruit of a tree or the like; for the lease in any of these cases, would be entirely useless, since the lessee, being entitled only to the use of the produce of the subject of the lease, would not be entitled to the use of any of these which are themselves the immediate subject of the lease.

† Such as a *bive*, or *bee-hive*.

‡ Literally, "not in the air."

as being an animal whence an advantage is derived. *Hanetfa* is of opinion also, that the sale of their eggs is unlawful. The two disciples, on the contrary, are of opinion that such sale is lawful of necessity.

THE sale of *pigeons*, of which the number is ascertained, and the delivery practicable, is lawful, as in such circumstances they constitute property.

The sale of tame pigeons is valid.

It is not lawful to sell an absconded slave, because the prophet has prohibited this; and also, because the delivery is impracticable. If, however, the purchaser should declare that "the fugitive is in his possession," the sale is lawful, because the obstacle on which the prohibition is founded is in this case removed.—It is to be observed that if the purchaser, in this instance, should have declared, before witnesses, that "he had taken possession of this slave with intent to restore him to his owner," he is not held, on the conclusion of the contract, to become seized of him in virtue thereof; because the former seizure, being in the nature of a *trust*, cannot stand in the room of that made on account of *purchase*. If, on the other hand, he should have made no such declaration, in that case he is held to be seized of the slave, in virtue of the sale, immediately on the conclusion of the contract; because the former seizure, being in the nature of an *usurpation*, may therefore stand in the room of a seizure for sale; for both are the same in effect, as they both equally induce responsibility. If the slave should have eloped to some other person, and the purchaser say to the proprietor "sell me your slave who has run away to such an one," and the seller accordingly agree, the sale is in that case also unlawful, because of the impracticability of the delivery.

The sale of an absconded slave is invalid, (unless he be in the hands of the purchaser,)

If a person, having sold a fugitive slave, should after the sale recover him, and deliver him to the purchaser, the sale is nevertheless unlawful,

although the seller should afterwards recover and

deliver him
to the pur-
chaser.

unlawful, because it was originally null, in the same manner as if it had related to a *bird in the air*. It is recorded, as an opinion of *Haneefa*, that the sale in this case is valid, provided it was not undone previous to the delivery, because it was founded on property, and there was no bar to its effect except the impracticability of the delivery, which is removed by the recovery of the slave; (and such is also related as the opinion of *Mohammed*;)—in the same manner as if a slave, after having been sold, should run away previous to the seizure of the purchaser, in which case, if the seller should afterwards recover him, and deliver him to the purchaser, the sale is binding, provided it was not dissolved in the interval.

The sale is
invalid, of a
woman's
milk,

THE sale of a woman's milk is unlawful, although it be in a *vessel*. *Shafei* is of opinion that if it be in a vessel the sale of it is lawful, because it is a pure beverage. The argument of our doctors is that, as being part of a human creature, it ought to be respected; and the exposure of it to sale is an act of disrespect. In the *Zabir-Rawdyet* there is a distinction between the milk of a *female slave* and a *free woman*. It is related, as an opinion of *Abou Yoofof*, that the sale of the milk of a *female slave* is lawful, because the sale of the *slave herself* is lawful. The answer to this is that the sale of the *female* is legal, because of the bondage, which is a quality of her person; but such quality does not relate to the *milk*; the one being *alive*, and the other *dead*.

or the bristles
of a hog,

THE sale of the bristles of a hog is unlawful, because the animal is essentially filth, and because the exposure of this article to sale is a degree of *respect*, which is reprobated and forbidden. It is lawful, however, to apply it to use, such as stitching leather, for instance, in the room of a needle, as this is warranted by necessity.

OBJECTION.—It would appear that the *sale* of it is warranted from necessity, in the same manner as the *use* of it.

REPLY.

REPLY.—There is no necessity for the sale of it, since any quantity of it may be had *gratuitously* and *without purchase*.—It is to be observed that hogs' bristles falling into a little water * renders it impure, according to *Abou Yoozaf*.—*Mohammed* is of a different opinion, because the legality of the use of the article in question, is (according to him) an argument of its purity. *Abou Yoozaf*, on the other hand, argues that the legality of the use of it is founded on *necessity*, and not on its *purity*; and there exists no necessity in the case of its falling into water.

THE sale of human hair is unlawful, in the same manner as is the use of it; because, being a part of the human body, it is necessary to preserve it from the disgrace to which an exposure of it to sale necessarily subjects it. It is moreover recorded, in the *Hadees-Sbareef*, that "God denounced a curse upon a *Wafila* and a *Mooftiwafila*."—(The *first* of these is a woman whose employment it is to unite the shorn hair of one woman to the head of another, to make her hair appear long; and the *second* means the woman to whose head such hair is united.) Besides, as it has been allowed to women to increase their locks by means of the wool of a camel, it may thence be inferred that the use of human hair is unlawful.

THE sale of the hides of animals is not lawful until they be dressed, because the use of them, until then, is prohibited in the traditions of the prophet. It is lawful, however, to sell dressed hides.

IT is permitted either to sell or apply to use the bones, sinews, wool, horns, or hair, of all animals which are dead, excepting those of *men* and *hogs*. The reason of this is that these articles are *pure*, and are not considered as *carion*: besides, death does not affect them as it

* By a *little water* (say the commentators) is here meant such a quantity as may be contained in a *cup* or other vessel.

does

may be either
sold or con-
verted to use.

does the *animal*, as these articles are not possessed of life.—It is to be observed that *Mohammed*, considering an elephant as *essential filth*, like a hog, holds the sale of it to be unlawful:—but the two disciples, considering it in the nature of a *wild* animal, regard the sale of it, or of the *bones* of it, as lawful.

A right can-
not be sold,
unless it in-
volve property

If in a house, of which the upper and under apartments belong to different persons, the whole, or the *upper story* only, should fall down, in that case the proprietor of the *upper* story is not permitted to sell his right, (namely, the right of building another *upper* story,) because this, as being only a *right*, is not *property*.

OBJECTION.—It would hence appear that the sale of a *right to water* * (that is, of a share in water used in tillage) is not lawful, as it is not the seller's *property*, but merely his *right*; whereas such a sale is allowed, if made along with the *land*, according to all authorities; and according to one tradition (which has been adopted by the *Sbeikhs* of *Balkh*) the sale of the right to water *by itself* is lawful.

REPLY.—The sale of a *right to water* is valid, because the term *Shirb* means a *share in water*; and that is an existent article, and in the nature of property;—whence it is that if a person, in a case where it is enjoyed by rotation, should destroy it during the term of his right, he is responsible for the value of it;—and also, that, when it is sold along with the ground, a part of the price is opposed to the *right to water*.

Any thing
may be sold
which admits
of a price

If a person bestow or sell a road † it is lawful: but neither the sale nor the gift of a *water-course* is valid. These cases admit of two suppositions.—I. The sale may be of the *absolute right* to the road or

* Arab. *Shirb*.—This term properly signifies *drow-wells* dug for the purpose of watering lands, and the right to the use of which is transferable, in the same manner as any other property.

† By a *road* is here meant a lane or narrow passage leading into a street or high-road.
water-course,

water-course, without defining the length or breadth of either.—II. It may be of the right of passing upon the road, or receiving the benefit of the water †.—Upon the *first* supposition, the difference between the two cases is that the road is certain and ascertained, because the known breadth of it is equal to that of a *door-way*:—but in the case of a water-course there is an uncertainty, because it is not known how much ground the water covers.—Upon the *second* supposition, there are two traditions with respect to a sale of a right of passage on the road:—according to one tradition the sale is lawful; and according to another it is invalid.—The difference between the sale of a right of passage on the road, and a right of benefit from the water, (as inferred from the first tradition,) is that a right of *passage* is a point which admits of being precisely ascertained, as it is connected with a known object, namely, the *road*; whereas the right of *benefit from the water* is of a nature which cannot admit of being precisely ascertained,—and this, whether the water be conveyed in a trough supported upon a wooden frame, or in a trench cut in the ground.

ascertainment:
but not other-
wise.

If a person sell a slave as a *female*, who afterwards proves to be a *male*, in that case the sale is utterly null.—It is otherwise where a person sells a *goat* (for instance) as a *male*, and it afterwards proves to be a *female*; for in that case the contract of sale is complete: the purchaser, however, has the option of keeping the animal, or rejecting it. The difference between these two cases is founded on this general rule,—that wherever *denomination* and *pointed reference* are united, by the seller pointing to the subject of the sale, and mentioning its *name*, (as if a person should say “I have sold this *goat*, for instance,)—in this case, if the article referred to prove essentially different from what was mentioned, the sale is supposed to relate to the *article named*; and therefore if the article referred to prove of a *different species* from what was named, the sale is null.—If, on the other hand, the article

A deception
with respect
to the *sex* in-
validates the
sale in *slaves*,
but not in
brutes.

* Literally, *causing the water to run*, (by opening a sluice, or so forth.)

referred to prove of the *same species* with the article named, but of a different quality, in this case the sale relates to the *article referred to*; and where the article referred to is found, the sale is complete: the purchaser, however, has in this instance an option, because of the *quality* mentioned not existing in the article;—as where, for instance, a person sells a slave as a *baker*, and he proves to be a *scribe*.—Now it is to be observed that a male and a female slave are not of *the same*, but of *two different* sexes, which is accounted, in this instance, as equivalent to being of different species, because of their different uses; whereas in *goats* the object for purchase (namely, *to eat their flesh*,) is the same, with respect both to the *male* and the *female*, and therefore they are not held to be of two different species.—It is proper to remark, in this place, that, amongst lawyers, the unity or difference of the *object*, and not the unity or difference of the *essence*, determines the unity or difference of the *species*. Thus *vinegar* of the grape is held to be of a different species from the *sweet juice* of the grape.

A re-sale to the seller, for a sum short of the original price, before payment of that price, is invalid:

If a person purchase a female slave for a thousand *dirms*, stipulating either a *future* or *immediate* payment, and having taken possession of her, should sell her to the person from whom he had purchased her, for five hundred *dirms*, previous to his having made payment of the thousand *dirms*, this second sale is invalid. *Sbafei* is of opinion that as the right of property in the slave had vested in the purchaser, because of his having taken possession of her, such sale, on the part of the purchaser to the seller, is valid, in the same manner as it would have been valid to any other person,—or as it would have been valid to the seller in case the second price had been equal to or greater than the first,—or in case it had been in exchange for other goods, although these should have been of a less value.—The arguments of our doctors are,—FIRST, a tradition that *Ayeesha*, having heard of a woman who, having purchased a female slave from *Zeyd Bin Rakim* for eight hundred *dirms*, had afterwards sold her to the said *Zeyd* for six hundred *dirms*,
spoke

spoke to her thus; “*This purchase and sale on your part is bad; in form Zeyd, that certainly God will render null his pilgrimages and enterprizes achieved along with the prophet unless he repent of such conduct.*”—SECONDLY, if the sale in question be valid, it follows that the first seller remains indebted to the purchaser for *five hundred DIRMS*, and the purchaser to him for *one thousand DIRMS*. Now if their account should be balanced, and five hundred *dirms* be struck off from the debt of the purchaser, in liquidation of his claim upon the seller, there remains five hundred due by the purchaser, for which he has received no return, and this is unlawful. It is otherwise where the seller, in the second sale, gives the purchaser goods in return; because there the difference is not obvious; being apparent only with respect to articles of *the same kind*.

IF a person, having purchased a female slave for *five hundred DIRMS*, and taken possession of her, should afterwards, before he had discharged the price, sell her, in conjunction with another, for *five hundred DIRMS*, to the person from whom he had purchased her, in that case the sale is valid with respect to the female slave whom he had not formerly purchased from that person, but null with respect to the other. The reason of this is that, as a part of the price is necessarily opposed to the *new* slave, it follows that he purchases a slave, and sells her again to the same person for a less price than he had purchased her for, which is not lawful, as has been already shewn.—No such reason of illegality, however, existing with regard to the sale of the *other* slave, it is therefore valid, in a price proportioned to her value.

but the contract is not invalid with respect to any other subject which may be joined to the original in the re-sale.

OBJECTION.—It would appear that the sale of the *other* slave is also invalid, because the person has sold both by one contract, and as the sale of the *one* is invalid, it would follow that the sale of the *other* is also invalid, (according to the tenets of *Haneefa*,) in the same manner as where a freeman and a slave are sold by one contract, the

sale of the *slave* being in that case invalid as well as that of the *freeman*.

REPLY.—The sale of the other slave is valid; and the invalidity of sale with respect to *one* does not affect the sale of the *other*; because the *invalidity*; in this instance, is *weak*, as there is a difference of opinion regarding it amongst our doctors; and also, because it is founded on a suspicion of *usury*, the effect of which suspicion cannot extend beyond the *subject* of suspicion, namely, the first slave.

The stipulation of a specific *tare* invalidates a sale.

IF a person purchase oil, on this condition, that it be weighed with the vessel in which it is contained, and that a deduction of fifty *ratls* shall be made on account of the weight of the vessel, such sale is not valid; whereas, if the condition be, in *general* terms, that “a deduction shall be made for the weight of the vessel,” it is valid;—because the *former* condition is not essential to the contract, whereas the *latter* is essential.

Case of a dispute concerning the *tare* of the vessel which contained the commodity.

IF a person, having purchased oil in a leathern bag, should carry it away with him, and afterwards return a bag to the seller weighing ten *ratls*, and the seller assert that “this is not the bag he had carried away with him, as that weighed only *five* RATLS;” in this case the averment of the purchaser is to be credited, whether the question of disagreement be considered as relating to the *bag* being different,—or to the consequent difference it creates with respect to the quantity of oil; because, if the difference be considered as relating to the *identity of the bag* of which the purchaser had taken possession, *his* assertion must be credited, since the word of the possessor is to be credited, whether he be *responsible* for the article (as in the case of an *usurper*) or merely a *confident* (as in the case of a *trustee*;)—or if, on the other hand, the difference be considered as relating to the *quantity of oil*, this resolves itself into a difference with respect to the *amount of the price*,

price, the feller claiming *more*, and the purchaser acknowledging less: the purchaser is therefore the defendant; and the assertion of a defendant, upon oath, must be credited.

If a *Mussulman* desire a *Christian* either to purchase or sell wine or a hog on his account, and the *Christian* act accordingly, in that case (according to *Haneefa*) such sale or purchase is valid: but an order of a *Mussulman* to this effect being in the highest degree abominable, he is therefore enjoined (where it respects the *sale* of those articles) to devote the price obtained for them to the poor.—The two disciples maintain that the purchase or sale of wine or a hog by a *Christian*, on account of a *Mussulman*, is invalid; (and the same difference of opinion also obtains with respect to the case of a *Mohrim* appointing an agent for the sale of the game he may have caught, when it became unlawful for him to make such sale.) The argument of the two disciples is that the constituent, as not having himself the power of selling or purchasing these articles, cannot of consequence invest others with such power;—besides, as all the acts of an agent revert to the constituent on whose behalf they are performed, it is therefore the same as if the *Mussulman* were *himself* to sell or purchase these articles, which would be illegal. The argument of *Haneefa* is that the *contractor* (that is, the *purchaser* or the *seller*) is, in this instance, no other than the *agent*;—for this reason, that *he* is fully empowered to perform these acts: the reverting, moreover, of the property to the constituent is a necessary and unavoidable effect, and therefore is not prevented by his *Islam*;—in the same manner as the articles in question may descend to a *Mussulman* by *inheritance*;—(in other words, if a *Christian*, whose heir is a *Mussulman*, should himself embrace the religion of *Islam*, and afterwards die, before releasing his hog, or converting his liquor into vinegar, in that case they would descend to his *Mussulman* heir.)—It is to be observed, however, that although *Haneefa* admits the validity of the *purchase* of these articles by a *Christian* agent, on behalf of a *Mussulman*, still he holds it incumbent on the

A *Mussulman* may commission a *Christian* to sell or purchase unlawful articles on his account; and such sale or purchase, made by the agent, is valid.

the *Musfulman* to convert the liquor into *vinegar*, and to set free the hog.

A sale is rendered invalid by the insertion of any condition advantageous to either party, or repugnant to the requisites of the contract; or which may occasion contention, by involving an advantage to the *subject* of the sale:

If a person sell a male slave, on condition that the purchaser shall emancipate him, or make him a *Modabbir*, or a *Mokâtib*,—or if a person sell a *female* slave, on condition that the purchaser shall make her an *Am-Valid*,—such sale is invalid; because this is a sale *suspended on a condition*;—and such sales are condemned by the prophet.—The rule, in this particular, is founded on a tenet of our doctors, that the insertion of any condition which is a necessary result of the contract (such as where the seller bargains that “the purchaser shall become “proprietor of the article sold,”) can no way affect the validity of the contract, since that would be established independant of any stipulation;—and, on the other hand, that the insertion of any condition which is not a necessary result of the contract, and in which there is an advantage either to the buyer or the seller,—or to the *subject* of the sale, if capable of enjoying an advantage, (such as where the seller bargains that “the purchaser shall *emancipate* the slave he sells to him,”) renders the contract invalid; because an additional and extraneous act is, in this instance, required from the purchaser, without stipulating a recompence to him, and which of consequence is of an usurious nature;—and also, because as there is an advantage in this condition to the *subject* of the sale, who is capable of claiming it, it follows that a contention must necessarily ensue, and hence the object of sale (namely, the prevention of strife) is frustrated.—Conditions of this nature are therefore unlawful, excepting where custom and precedent prevail over analogy; as where a person purchases unsewed shoes on condition of the seller’s sewing, or causing them to be sewed for him. The insertion, on the other hand, of any condition which is not a necessary result of the contract, and which, moreover, is not attended with advantage to any particular person, does not invalidate the contract.—An example of this occurs where a person sells an animal, on condition that “the purchaser shall *sell it again* ;” which condition

is

is lawful, because there is no particular person whose right it is to claim the performance of it, (since the *animal* is incapable of so doing,) and hence neither usury nor strife can attend such a stipulation. Now, having explained the tenets of our doctors, it is proper to remark that the conditions recited in the cases in question are repugnant to the nature of the contract, as they tend to deprive the purchaser of every right to which the sale entitles him; and they also involve an advantage to the subject of the sale, who is capable of claiming it:—they therefore invalidate the contract.—*Shaf'ei* dissents from our doctors, as he holds the sale of a slave, on condition of his emancipation, to be valid.

If a person should emancipate a slave whom he had purchased on that condition, then the sale, which, because of such condition, was previously illegal, becomes valid, according to *Haneefa*; and the purchaser is responsible to the seller for the price. The two disciples are of opinion that the emancipation does not render the sale valid; and that therefore the payment of the *value*, and not of the *price*, is incumbent on the purchaser; because, as the sale was originally invalid, in consequence of the condition, it cannot afterwards be rendered valid by means of the emancipation, any more than by the purchaser's *murdering* or *selling* the slave. The reasoning of *Haneefa* is, that although the condition of emancipating the slave be not, *in itself*, agreeable to the requisites of a contract of sale, (as was before explained,) still it is so *in effect*; because it completes the right of property on the part of the purchaser; and a thing becomes established and confirmed by its completion; whence it is that the emancipation of a purchased slave is no bar to a right of compensation from the seller in case of a defect.

but such sale recovers its validity, by the purchaser performing the condition with the article purchased:

If a person sell a *slave*, on condition that "he shall serve him for the space of two months after the sale,"—or a *house*, on condition that "he shall reside in it for the space of two months after the sale,"

Sale is rendered invalid, by a reservation of any advantage to

the *seller* from
the article
sold.

“*sale*,”—or, if a person sell any other article, on condition of the purchaser’s lending him a *dirm* (for instance,) or making him some present,—the sale so suspended on any of these conditions is invalid: **FIRST**, because these conditions are not agreeable to the nature of a sale, and are attended with an advantage to the seller. **SECONDLY**, because the prophet has prohibited a sale on condition of a *loan*: and, **THIRDLY**, because, if any diminution be made in the price, on account of the services of the slave, or the residence in the house, it follows that a contract of *rent* is interwoven in that of *sale*; or if, on the other hand, *no* diminution be made in the price on these accounts, it follows that a *deed of loan* is interwoven in the sale; and both of these are illegal.

or, by the stipulation of a delay in the delivery of it;

IF a person sell goods on condition of his being permitted to suspend the delivery for a month, the sale is in such case invalid, because a suspension with respect to the delivery of goods which are extant and specific is an unlawful condition. The reason of this is that a suspension in point of time has been ordained by the **LAW**, merely for the purpose of *ease*, and is therefore only applicable to a *debt*, in order that the debtor may have time to collect the sum within the prescribed period and pay it accordingly;—but with respect to a thing actually extant, (such as *cloth*, for instance,) there can be no occasion for such suspension.

or, by the insertion of an invalid condition,

THE sale of a *pregnant* slave, with a reservation of the *fetus* in her womb, is invalid; because it is a general rule that nothing, the sale of which by *itself* is illegal, can be made an exception to a contract of sale; and of this nature is a *fetus*. The sale, therefore, is invalid, because of the invalidity of the condition. It is to be observed that a contract of *Kitabat*, of *hire*, or of *pawnage*, are the same with a contract of sale, in this respect, that an invalid condition is a means of invalidating the deed. In the case of *Kitabat*, however, the invalid condition must actually exist in the deed; as when a person

person enters into covenant with his slave to emancipate him on condition of his giving him *wine*, or a *bag*. It is also to be observed that in the cases of gift, alms, marriage, *Kboola*, and composition for wilful murder, the exception of the *fatus* does not invalidate the deed; on the contrary, the deed takes place in full; but the *condition* is invalid. In the same manner, an exception of the *fatus* does not invalidate a *legacy*, for in this case the exception is a valid condition.

If a person purchase cloth, on condition that the seller sew it into the form of a vest on his account, the sale is in such case invalid; since this condition, besides being attended with an advantage to the purchaser, is not a requisite of the contract of sale. Moreover, this necessarily supposes the implication of terms of *two different* contracts; that is, either of *sale and loan*, or of *sale and hire*.

or of a condition which implicates the subject of another contract;

If a person purchase *one* shoe from another, on condition that the seller prepare a *fellow* to it on his account,—or purchase a *pair* of shoes on condition of the seller making straps to them, for the purpose of tying them, the sale in either case is invalid.—(The compiler of the *Hedaya* remarks that this is according to *analogy*; for a more favourable construction would suggest that such sale is lawful, on account of its being customary amongst men.)

If a person should purchase an article, and stipulate the payment of the price on the day of the new year, or on the *Mibriján**, or on the fast of the *Christians*†, or the day of breaking lent amongst the *Jews*, the sale, under such conditions, is invalid, provided both parties be not informed with certainty respecting those periods. The sale,

or by a stipulation of the payment of the price, at a period not precisely known to both parties,

* This is also termed *Mirbhdn*. A festival observed by the ancient *Persians* on the day of the autumnal equinox.

† *Easter*.

however, is lawful, if these periods be ascertained within the knowledge of both parties.

or the date of the occurrence of which is uncertain:

A SALE is not valid where the price is stipulated to be paid on the return of the pilgrims, or, on the cutting of the grain, or on the gathering of the grapes, or on the shearing of the sheep,—because in none of these cases is the period absolutely determinate: contrary to the act of *giving bail*; for the giving of bail, until any of these periods, is lawful; because a *small* degree of uncertainty does not invalidate a bail-bond, in the same manner as it does a contract of sale.—

(but it is valid where the time of payment is fixed by a *subsequent agreement*.)

If, however, a sale be made in an absolute manner, and the seller afterwards agree to receive the price at any of the periods in question, it is lawful, because, this stipulation not being included in the contract of sale, it becomes a *stipulation with regard to payment of DEBT*, (not the *price*) which admits of a small degree of uncertainty.

A sale, invalid in consequence of stipulating an uncertain time of payment, recovers its validity by the removal of the uncertainty.

If a sale be made, stipulating payment of the price at any of the periods above stated, and afterwards the purchaser and seller jointly, or the purchaser alone, remove the obstacle of uncertainty*, prior to the actual occurrence of the period stipulated, the sale then becomes valid. *Ziffer* maintains that, the sale being originally invalid, the subsequent removal of the obstacle cannot render it valid; in the same manner as a marriage originally contracted for a fixed period would not become valid by rendering it perpetual. The argument of our doctors is, that the invalidity of the sale, in this case, is merely because of the apprehension of the litigation, to which the uncertainty may give rise; and of course, when this uncertainty is removed, the sale remains valid. Moreover, as the uncertainty, in this case, relates only to an *accidental circumstance*, that is, to the *period* when the price is to be paid, and not to the *price itself*, which is one of the

* By paying the *price*, or fixing the time of payment to some *specific period*, such as *forty days* for instance.

essentials of sale, the uncertainty is capable of being removed. It is otherwise where a person sells one *dirm* for two *dirms*, and afterwards relinquishes the additional *dirm*; for the sale does not in consequence of such relinquishment become valid, since the invalidity related to the price itself which is an essential of the sale. It is also otherwise in a case of *marriage* for a particular period, because this, in fact, is not a *marriage*, but a separate deed called *Matâr* *, and by no subsequent acts can one deed be transmitted into *another* deed.

If a person expose to sale a freeman and a slave, and sell them both in one contract,—or, in the same manner, sell a carrion goat†, and one that has been slain by the prescribed form of *Zibby*,—such sale, according to *Haneefa*, is utterly invalid with respect both to the freeman and the slave, as in the *first* case, and the carrion, and slain goat, as in the *second*;—and this, whether the seller have opposed a specific price to each or not: (the two disciples are of opinion that if a specific price be opposed to each, the sale is valid with respect to the *slave*, or the *slain* goat.) If, on the contrary, a person unite in sale, an absolute *slave* and a *Modabbir*, or a slave that is his property, and another that is *not*, the sale is in either case lawful, with respect to the absolute slave, or the slave which is his property, in return for a proportion from the whole price stipulated. This is, according to our doctors, (namely, *Haneefa* and the two disciples.)—*Ziffer* is of opinion that the sale is not lawful in either case, with respect to either subject. The two disciples argue, that where a specific price is opposed to each particular subject, the invalidity of the sale extends only to that subject which contains a *cause* of invalidity, (namely, the *freeman* or the *carrion*) but does not reach to the *other* subjects, (namely, the slave or the slain goat;)—in the same manner as where a person marries a strange woman and his own sister by one contract, in which case the marriage is valid with respect to the stranger, although it be invalid

The sale of a *saleable* with an *unsaleable* subject is invalid:

but if the *unsaleable* subject be *property*, the sale holds good with respect to the *saleable* subject.

* See Vol. I. p. 91. † Meaning any dead *spat*, not slain according to LAW.

with respect to his *sister*,—for that invalidity does not extend to the stranger ;—and so also in the case in question. It is otherwise where the price of each particular subject has not been specified ; for in that case the invalidity extends to the whole. *Haheefa* argues that there is a material difference between the two cases ;—namely, the case of joining in sale a *freeman* with a slave, and that of joining a *Modabbir* with a slave ; because a freeman, as not being property, is utterly incapable of being included in a contract of sale ; and as the comprehension of him in the sale necessarily establishes the condition of the acceptance of the sale with respect to *him*, it follows that the sale is invalid, because of the invalidity of the condition : contrary to *marriage*, as that is not rendered invalid by an invalid condition. The sale, on the other hand, of a slave the property of another, or of a *Mokátib*, *Modabbir*, or *Am-Walid*, is merely *suspended*, for these may be included in a contract of sale, as they are property ;—whence it is that the sale of them may be carried into execution, in the case of the *stranger's* slave, by the consent of the proprietor,—in the case of a *Mokátib* by his *own* consent,—and in the case of a *Modabbir* or *Am-Walid* (in the opinion of the two *Elders*) by a decree of the *Kázee* to this effect ;—but as it is to be supposed that the proprietor of the slave, on account of his right to the subject of the sale, and the *Mokátib*, *Modabbir*, or *Am-Walid*, because of the claims established in their persons, will repel the sale, the sale therefore is executed only with relation to the absolute slave ; in the same manner as where a person purchases two slaves, of whom one dies previous to the purchaser taking possession of them ; in which case the sale holds good with respect to the other.

SECTION.

Of the Laws of Invalid Sales.

WHENEVER the purchaser, in an invalid sale, takes possession of the goods, with the consent of the seller, then, provided both the goods and the price be property*, the purchaser becomes proprietor of the article sold, and remains responsible, not for the *price*, but for the *value* of the goods, in case they be destroyed in his possession. *Sbafci* maintains that the purchaser does not become proprietor, although he *take possession* of the article, because an invalid sale is forbidden, and therefore cannot substantiate a right of property: besides, any thing which is *forbidden* is not sanctioned by the LAW, since *prohibition* is repugnant to *ordinance*; an invalid sale, therefore, is in no respect sanctioned by the LAW; (whence it is that the purchaser of goods does not become proprietor before seizin;) and the case is consequently the same as if a person should sell something in exchange for carrion, or should sell *wine* in exchange for *money*. Our doctors, on the other hand, argue that, in this case, the *essential* of sale (namely, an exchange of property for property) exists. The *subject* of the sale, moreover, is property, and is therefore a *fit* subject. The buyer and seller also are both competent to the act:—and where all these circumstances exist, the sale is duly contracted. Besides, the prohibition is no way repugnant to the legality of the *sale itself*, because the prohibition relates only to an *accessary* circumstance, namely an *invalid condition*; the right of property, therefore, after seizin, accrues to the purchaser in virtue of the *sale itself*, which is legal, and

In an *invalid* sale, the purchaser is responsible, not for the *price*, but for the *value*, of the article, in case of its perishing in his hands, where he has taken possession of it by consent of the seller.

* That is, be of such a nature as to constitute property.

not in virtue of any matter which is *prohibited*, or contrary to the LAW. The purchaser, moreover, does not become proprietor of the goods *before* seizure, for two reasons:—FIRST, because, although an invalid sale be a *cause* of right of property, yet it is a *weak* cause, and therefore stands in need of the aid of seizure to give it effect:—SECONDLY, because, if the purchaser become proprietor *previous* to the seizure, it would necessarily follow that a sanction is given by LAW to the invalidity, whereas it is incumbent to *remove* the invalidity. With respect to the cases of a sale of any thing in exchange for *carrion*, or of *wine* in exchange for *money*, the essentials of sale do not exist in either of these, as has been already demonstrated. It is established as a condition, in this instance, that the seizure be made *with the consent of the SELLER*; it is sufficient, however, (according to a favourable construction of the LAW,) if this consent be by *implication*; as if the purchaser should make the seizure *in the place of sale*, and *in presence of the seller*. The reason for a *favourable* construction of the law, in this particular, is, that as the seller, by the contract of sale, virtually empowers the purchaser to make seizure, and as the purchaser does so in his presence, without his making any objection thereto, it is therefore construed to have been made *with his consent*: in the same manner as the seizure of a gift, in the place where the deed of gift is executed, is valid according to a favourable construction of the law. It is also a condition, that both the goods and the return be *property*, in order that an *exchange of property for property* (which is one of the *pillars* of sale) be established; for if this were not the case, the sale would be *null*, in the same manner as a sale in return for *carrion*, *blood*, the person of a *freeman*, *air*, or the like; and hence if, in these cases, the purchaser should take possession of the goods with the consent of the seller, still he is not responsible for them. With respect to what was stated, that the seller “remains responsible, not for the *price*, but for the *value* “of the goods,” it relates only to such goods as are of a nature to be compensated for by *money*; for with respect to such as are compensable by *similars*, the purchaser is responsible for a *similar*; because that

and the value must be paid in money, or in a *similar*, according to the nature of the article.

that which is a similar both in *appearance* and in *effect* is a more equitable compensation than that which is similar in *effect* only.

IN an *invalid* sale, either of the parties, previous to the seizure, has the power of annulling the contract, in order that the invalidity of it may be removed. The law is also the same *after* seizure, provided the invalidity exist in the body of the contract. If, however, the invalidity be occasioned by the addition of an *invalid condition*, the person stipulating the condition is allowed to annul it, but not the *other* party.

Either party may annul the contract before seizure.

IF the purchaser, in an invalid sale, take possession of the article, and then sell it, in that case the second sale is valid,—as the first purchaser, having become proprietor in virtue of seizure, is fully competent to sell the article:—and, upon his so doing, the right of returning the article to the first seller expires:—FIRST, Because the right of the *individual* (namely the *second purchaser*) is connected with the second sale; and the annulment of the first sale in consequence of its invalidity, is on account of the right of GOD*; but the right of the individual has preference to the right of GOD, as the individual is necessitous, whereas GOD is *not* so:—SECONDLY, Because the *first* sale is legal in its *essence*, but *invalid* in its *quality*,—whereas the *second* sale is legal in point of both; and it follows that the *latter* cannot be obstructed in its operation by the *former*: and, THIRDLY, because the second sale is made with the *virtual* assent of the *first* seller, as the power to that effect was by him bestowed on the first purchaser.—It is otherwise where the purchaser of a house, in which there is a right of *Sbaffa*, sells it to another; for there the person entitled to the right of *Sbaffa* has nevertheless a just title to it; because it is the right of the *individual*, in the same manner as that of the second purchaser; is

A purchaser under an invalid sale may validly sell the article, in which case his right of annulling the sale expires.

* In other words,—the right of the LAW.

equal to it in point of legality; and has not been forfeited by any power given by him to the purchaser to make the sale.

The purchaser of a *lawful* article in return for one which is *unlawful*, may after possession dispose of it as he sees fit; remaining responsible only for the *value*.

IF a person purchase and take possession of a slave, in exchange for *wine*, or a *hog*, and afterwards either emancipate him, sell him, or bestow him in gift, all of these acts are valid, because of the purchaser, in virtue of the seizure, having become proprietor; and he is responsible to the seller for the value of the slave. In the case of *emancipation*, as the property immediately ceases, the slave becomes (as it were) *destroyed*, and hence proceeds the responsibility of the purchaser for the value. In the case of *sale* or *gift*, the responsibility arises from the right of returning him to the seller being annulled in consequence of these deeds, as has been already explained. It is to be observed that *pawnage*, or the making a slave a *Mokâtib*, is equivalent to *sale*, and therefore annuls the right of return to the seller. The redemption of the pledge, however, or the inability of the *Mokâtib* to perform his covenant, restores the right, because the bar to its operation is removed.

The seller cannot resume the article until he return the purchase-money:

and if the seller die, the purchaser is entitled to set up the article to sale, to indemnify himself for the price he has paid.

IN an invalid sale, the seller is not allowed to resume the goods from the purchaser, until he shall have first restored the purchase-money; because the goods, being opposed to the purchase-money, are retained in the nature of a pledge until the restitution of it. If the seller should die, then the purchaser has a prior claim to the subject of sale; that is, he is permitted to take payment of the price from the sale of the goods, giving the remainder (if there be any) to the other claimants; because, as he has a right in the goods superior to any other person, during the lifetime of the seller, he consequently has a right preferably to the seller's heirs or creditors after his decease; in the same manner as the holder of a pawn. It is to be observed, that if the price was paid in *dirms*, the purchaser has a right to exact from the seller the identical *dirms* he paid him; since the purchase-money, in the case of an *invalid* sale, remains in the hands

of

of the feller in the nature of an *usurpation*. If, however, the identical *dirms* be not in his possession, then the purchaser is entitled to an equivalent.

If a person purchase a house by an invalid sale, and afterwards convert it into a mosque, he is in that case responsible, according to *Haneefa*, for the value of the house. This is also related by *Abou Yoofoof*, in the *Jama Sagbeer*, as the opinion of *Haneefa*: but he afterwards entertained doubts respecting it. The two disciples maintain that the house must be restored to its original state, and then returned to the feller.—The same difference of opinion obtains, if the purchaser should plant trees in the court-yard of the house. The argument of the two disciples is that the right of the *neighbour** is of weaker consideration than the right of the *feller*;—(whence it is that the right of a neighbour requires to be supported by a decree of the *Kázee*, and also, that it becomes null, by any delay in the demand of it,—neither of which is the case with respect to a *feller's* right;) and as the right of the neighbour, which is the *weaker* right, would not be annulled by the conversion of the house into a mosque, it follows that the right of the *feller*, which is the *stronger*, is not thereby annulled *a fortiori*. The argument of *Haneefa* is, that the act of building or planting proceeds on an idea of perpetual possession; that the purchaser in so doing acts in virtue of a power to that effect which he holds from the feller; and that therefore the feller has no right to the restitution, in the same manner as in the case of its being resold by the purchaser. It is otherwise with the right of a *neighbour*, as he does not give power to the purchaser to build or plant on the place over which his right extends; whence it is that if the purchaser had either bestowed it in a gift, or sold it, his right of neighbourhood would nevertheless still have remained in force. *Abou Yoofoof*, who reported what is here advanced as the opinion of *Haneefa* on this sub-

Case of an *immovable* property, in which a change is wrought by a purchaser under an invalid contract.

* Arab. *Shaffee*; meaning the person entitled to the right of pre-emption in virtue of *Shaffa*.

ject, afterwards distrusted his memory, as has been already observed. *Mohammed*, however, in treating of *Sbaffa**, expressly infers the difference of opinion here recited;—for, he says, “where a purchaser, “under an invalid sale, builds upon the ground he has purchased, “the neighbour has no right of *Sbaffa* therein, according to the two “disciples, any more than previous to the purchase.” Now as *Haneefa*, on the other hand, has maintained that in such case the neighbour is entitled to take the place, upon paying the value, in virtue of his right of *Sbaffa*, it clearly follows that in his opinion the right of the seller is annulled; because it is on this circumstance that he founds his opinion of the existence of the right of *Sbaffa*, since so long as the right of the *seller* remains in force, that of the *neighbour* cannot take place;—whereas, according to the two disciples, the right of the seller is not destroyed by the building of the purchaser, and therefore the claim of *Sbaffa* does not take place.

The profit acquired by the purchaser, upon a definite article, purchased under an invalid contract, must be bestowed in charity;

If a person purchase a *female slave* (for instance) by an invalid contract, and take possession of her, and the seller take possession of the purchase-money, and the purchaser then dispose of her, by sale, to another person at a profit, it is in that case incumbent on him [the purchaser] to bestow in charity the profit so acquired:—but if the first seller should have acquired a profit upon, or by means of, the purchase-money, he is not required to bestow such profit in charity. The reason of this distinction is that as the *female slave* (for instance) is a *definite* article, the *second* contract of sale relates identically to her, and the profit acquired by the sale of her is accordingly *base*.—*Dirms* and *deenars*, on the other hand, are not *definite* in *valid* contracts; and as the *second* contract is of a *valid* nature, it consequently does not relate to them identically, and accordingly the profit acquired by them is *not* base. This distinction, however, obtains only where the baseness is founded on the *invalidity* of the right; for where it is founded

* In the *Mabfuf*.

on the absolute *non-existence* of right of property,—(as where, for instance, a *usurper* acquires a profit upon the property he has usurped,)—there is no difference whatever;—that is, from whichever subject the profit is obtained, it is unlawful, and must be bestowed in charity*; because, where a person sells an article, the identical property of another, (such as any article of *household goods*,) the contract of sale relates to that actual article, and the profit acquired by it is accordingly unlawful;—where, on the other hand, a person purchases a thing with *money* belonging to another, although the contract do not relate to that actual money, (since, if other money were given instead of it, the contract nevertheless holds good,) still, however, there is a *semblance* of the contract relating to that particular money; for if he were to give that actual money to the seller, the article purchased in return would remain appropriated to him; or if, on the contrary, he were only to *point* to that money, and then give other money instead of it, the amount of the price of the article is, virtually, in *that* money:—for this reason, therefore, there is a semblance of the contract relating to that money, and consequently that the profit is acquired by means of the property of another person. Now, as the baseness occasioned by an *invalidity* of right is of less moment than that occasioned by the absolute *non-existence* of right, it follows that the baseness occasioned by the *invalidity* in the right of property occasions a *semblance* of baseness in any thing in which the absolute *non-existence* of right occasions *actual* baseness; (and that is any thing of a *definite* nature, such as a *slave girl*, for instance, at in the case in question;)—and, on the other hand, that it occasions an *apprehension* of a semblance of baseness in any thing in which the absolute *non-existence* of right occasions only a *semblance* of baseness;—and regard is had to a semblance of baseness, but not to

and so also, profit acquired upon any article in which no right of property exists.

* For an explanation of the principle on which this proceeds, see *Partnership*, (Vol. II. p. 325.) where it is declared that “profit cannot be lawfully acquired upon a property con-
“cerning which there is no responsibility.”

an *apprehension* of a semblance.—It is to be observed that if a person claim a debt from another of a thousand *dirms*, and obtain payment of the same, and both parties afterwards agree that the debt was not due,—in that case the profit which the claimant may in the mean time have acquired by possession of the money is lawful to him; because the *baseness*, in this instance, is occasioned by *invalidity* of right; for this reason, that the debt had been owing in consequence of the demand of the claimant, and the defendant's acknowledgment of it; and it afterwards appears that this debt is *not* the right of the *claimant*, but of the *other*, (namely, the *defendant* :) still, however, the thousand *dirms* which the claimant took in satisfaction for his demand have become his property, as the satisfaction for a claim becomes the property of the claimant, although it be under an invalid right;—and as the baseness, in this instance, is occasioned by the mere *invalidity* of right of property, and not by the absolute *non-existence* of that right, it consequently cannot operate, nor have any effect with respect to a thing of an *indefinite* nature, such as *money*, for instance.

SECTION.

Of SALES and PURCHASES which are ABOMINABLE.

It is abominable to enhance the price of merchandise by a fictitious tender of a high price;

THE prophet has prohibited the practice of *Najish*,—that is, the enhancement of the price of goods, by making a tender for them, without any intention to purchase them, but merely to incite others to the offer of a higher price. The prophet has also prohibited the purchase of a thing which has already been bargained for by another; but this prohibition supposes that both parties had before come to a mutual

mutual agreement; for otherwise there is no impropriety in such subsequent purchase.

THE PROPHET has also prohibited an anticipation of the market,—
as where people meet the caravan, at a distance from the city, with
a view of purchasing the grain brought by the merchants, in order to
sell it to the people of the city at an enhanced price. This prohibi-
tion, however, proceeds on a supposition that the forestallers deceive
the merchants with respect to the price of grain in the city; for
otherwise there is no impropriety in this practice.

or, to antici-
pate or fore-
stall the mar-
ket;

THE PROPHET has also prohibited a *citizen* from selling for a
countryman;—as where, for instance, a countryman brings grain or
other goods into a city, and one of the citizens takes care of it, and
acts as his agent, in order that he may sell it at a high price to the
people of the city.—Some have given a different explanation of this
prohibition, by supposing it to allude to a *citizen's* selling any thing at
a high price to a *countryman*: but in the *Fattabal Kadeer* of *Moojtibba*
the *former* is mentioned as the most authentic explanation.—It is to be
observed, however, that this prohibition supposes that a scarcity
of grain prevails in the city, as otherwise such conduct is not im-
proper.

or to enhance
the price of
grain, in
towns, by a
citizen selling
for the *farmer*;

It is abominable to buy or sell on a *Friday**, after the cryer pro-
claims the hour of prayer, because GOD has said, in the *Koran*,
“WHEN YE ARE CALLED TO PRAYER, ON THE DAY OF THE
“ASSEMBLY, HASTEN TO THE COMMEMORATION OF GOD, AND
“LEAVE MERCHANTISING.”. Moreover, if at such time purchase
and sale were allowed, an *absolute duty* (namely, attendance at
prayers) would necessarily be omitted. It is to be observed, however,
that although such purchases and sales be *abominable*, still they are not

or to buy or
sell on a *Fri-*
day.

* Friday is the *Musfulman* Sabbath.

invalid;

invalid; for the invalidity, in such instances, exists with respect merely to points that are *extraneous* and *additional*, and not with respect to the *essentials* of the contract, nor with respect to the establishment of any condition essential to its obligation.

Merchandise
may be set up
for sale to the
bigbest bidder.

A SALE to the *bigbest bidder* is not abominable. Thus, if a merchant, for instance, having shewn his wares to a purchaser, should receive from him a tender for them, but, before he had expressed his acquiescence, should receive a *higher* tender from *another*, in that case it is not abominable in him to sell them to the latter;—because the prophet sold a cup and a sheet to a higher bidder; and also, because sales of this kind are for the interest of the *poor*.

It is abominable to separate two infant slaves, (or a *infant* and an *adult*.) related within the prohibited degrees, by a sale of one of them;

IT is abominable for a person possessing two infant slaves, related to each other within the prohibited degrees, to separate them from each other; and the rule is the same where one of them is an *infant* and the other an *adult*. This decision is founded on a declaration of the prophet, “*Whoever causes a separation between a mother and her children, shall himself, on the day of judgment, be separated from his friends by GOD.*” It is, moreover, related that the prophet gave two infant brothers to *Alee*, and afterwards enquired of *Alee* concerning them, and being answered, by him, that “*he had sold one of them,*” the prophet then said “*take heed!*” “*take heed!*” and repeatedly enjoined him to take him back. Besides, one infant naturally conceives an attachment to another, and an adult person participates in the sorrow of an infant, and hence the separation of them in either case argues a want of tenderness to a child, which has been reprobated in the traditions, where it is declared “*Whoever does not shew tenderness to a CHILD, and respect to an ELDER, is not of my people.*” A separation, therefore, either between two *infants*, or between an *adult* and an *infant*, is prohibited. It is to be observed that the cause of the prohibition, in this instance, is *affinity within such a degree only as prohibits marriage* between the slaves in question, and

and not *general* affinity, for which reason any *distant* relation, such as a *step*-mother, or one prohibited by fosterage, or by affinity with the fosterer, are not included; nor the son of the uncle; nor any one that is not within the prohibited degrees. Neither are a *husband* and a *wife* included in this prohibition, notwithstanding they be both infants, and they may consequently be separated, because the tradition which contains the prohibition, as being contrary to analogy, must therefore be observed in its *literal* sense; that is, it must be applied to such only as are within the prohibited degrees. Moreover, in the aforesaid tradition, both relations are required to be the property of one master: if, therefore, one infant brother belong to *Zeyd*, and another infant brother to *Omar*, each is at liberty to sell his respective property. It is allowed, likewise, to separate two infant slaves related to each other, if with a view to fulfil an incumbent duty, as where one of the two commits a crime, and is given up, as a compensation for such crime, to the avenger of the offence. In the same manner, also, one of the two may be sold, for the payment of a debt incurred by him in the course of purchase and sale, in consequence of his being a privileged slave,—or, by the destruction of the property of another,—in either of which cases that slave may be sold alone, in discharge of the debt, although this induce a separation.—So also, it is lawful to return one of the two to the seller of them, in case he should prove defective. The adjudication, in all these cases, proceeds on this principle, that the object of the prophet in this prohibition was to prevent an injury to the *infants* without detriment to the *proprietor*; an object which, if the prohibition were extended to these cases, must necessarily be defeated.—It is to be observed, however, that if a person separate *one* infant from *another*, or an *infant* from an *adult*, by *selling* one of them, such sale is valid: yet still the act of *separation* is *abominable*. It is recorded, from *Abou Yoosaf*, that a sale of this nature is invalid only where the relation of *paternity* (such as *mother* and *son*, for instance) exists between the parties; but that in all other cases it is valid.

unless in the
pursuance of
an indispens-
able duty, or
in cases of
unavoidable
necessity:

but such sale
is neverthe-
less valid.

Another report, from *Abou Yoosaf*, mentions that sales of this nature are invalid in all cases where the *separation* is abominable, because of the tradition already mentioned with respect to *Alee*; for the prophet *positively enjoined* him to take back the slave he had sold, whence it may be inferred that he considered the sale as invalid, since a return of the commodity is not admitted but in an *invalid* sale. The reasoning of *Haneefa* and *Mohammed* is that, in the case in question, the sale is transacted by a competent person, and with respect to a fit subject: it is therefore valid; and the abomination does not apply to any thing except what is merely a *concomitant*, or *immediate effect* of the sale, namely, the distress occasioned to the two infants, which is a degree of abomination exactly equivalent to that of a person *purchasing* a thing over the head of another, from whence no invalidity arises.—Moreover, the order of the prophet to *Alee* to take back the slave must be construed either into a *dissolution* of the sale, or a repurchase of the slave from the person to whom he had sold him.

Adult slaves.
may be separated without
offence.

It is not abominable to separate two slaves that are *adults*, notwithstanding they be related within the prohibited degrees; for this case falls not under the ordinance before mentioned; and there is an authentic tradition of the prophet having occasioned a separation between *Maria* and *Sireen*, two female slaves that were sisters.

CHAP. VI.

Of *Akâla*, or the *Dissolution* of Sales.

AKÂLA literally signifies to *cancel*.—In the language of the LAW it means the *cancelling* or *dissolution* of a *sale*. Definition of *Akâla*.

THE dissolution of a sale is lawful, provided it be for an equivalent to the original price, because the prophet has said “ *whosoever makes an AKÂLA with one who has repented of his bargain, shall receive an AKÂLA of his sins from GOD, on the day of judgment;*”—and also, because, as the contract of sale comprehends the rights of both parties, namely, the buyer and the seller, they have therefore the power of dissolving such contract, to answer their own purposes.—If, however, either a greater or less sum than the original price be stipulated as the condition of the dissolution, such condition is null, and the dissolution holds good; and the seller must return to the purchaser a sum equal to the original price.—It is a rule with *Haneefa*, that a *dissolution* is a *breaking off* of the contract with respect to both the parties, but a sale *de novo* with respect to others. If, therefore, the breaking off be impracticable, the dissolution is null.—According to *Abou Yoosaf*, on the other hand, it is a sale *de novo*: but if a new sale should from any cause be impracticable, then it must be considered as a *breaking off*: and in case of that also being impracticable, the dissolution then becomes null.—The opinion of *Mohammed* is that it is a *breaking off*; and in failure of this, from impracticability, a sale *de novo*; and in case of that also being impracticable, it is null.—The argument of *Mohammed* is that *Akâla*, in its *literal* sense, signifies *dissolution*; and, in its *constructive* sense, *salé*; (whence it is a sale *de novo* with relation

A sale may be dissolved in consideration of an equivalent to the price:

but not for any thing greater or less.

to all others than the parties :) it is therefore regarded as a *dissolution* or *breaking off*, agreeably to the *literal* meaning of the term; or, if the *breaking off* be impracticable, it is regarded as a *sale*, agreeably to the *constructive* meaning.—The argument of *Abou Yoosaf* is that *Akdla* means an exchange of property for property with the mutual consent of the parties, which corresponds with the definition of *sale*, and is also subject to the same rules; whence it is that, in case of the loss of the wares in the possession of the purchaser after the conclusion of the *Akdla*, or *dissolution*, it [the *Akdla*] is null; and also, that the seller is allowed to return the wares to the purchaser in case of their having been blemished or become defective whilst in the hands of the purchaser; and that the right of *Sbaffa* is also established by it.—*Haneefa*, on the other hand, argues that *Akdla* means a *dissolution*, or *breaking off*, and cannot, by any construction of it, be supposed to mean *sale*, although the breaking off should be impracticable; because *sale* and *dissolution* are terms of opposite import, which no one word can be supposed to bear:—if, therefore, the *breaking off* be impracticable, the *Akdla* is null. With regard to its being a *sale de novo*, in relation to others, this is a mere matter of necessity; as to *them* it exhibits similar effects with *sale*; that is to say, the seller, in virtue of the *Akdla*, becomes again proprietor of the wares; and it is accordingly a *sale* with respect to all others than the seller and purchaser, for *this* reason, and *not* because of the *meaning* of the word, which in reality is the *opposite* of *sale*.—Such are the opinions and arguments of our three doctors with regard to *Akdla*.—Hence it appears that if a stipulation be made, that the seller shall return to the purchaser a sum *greater* than the original price, the *dissolution*, agreeably to the tenets of *Haneefa*, would hold good to the amount of the original price; because (according to his tenets) *Akdla* is a *dissolution*; and a dissolution cannot possibly relate to the excess, as there is no *sale* which might be opposed to such excess; and it is impossible to dissolve what does not exist:—the *condition*, therefore, is invalid, but not the dissolution, as that is not rendered null by involving an invalid condition.—It is other-

wife with respect to *sale*,—(that is, the sale of *one* *DIRM* for *two* *DIRMS*, for instance,)—for if a person should sell one *dirm* for two *dirms*, such sale would be invalid; nor could it be construed as existing with respect to one *dirm*, and as null with respect to the additional one, so as to render such sale lawful; because the establishment of an excess in sale is possible, as that is an establishment of a matter as yet unestablished, and it is no way difficult to establish an *unestablished* point; but if the excess *dirm* were established, it would induce *usury*:—a sale of this nature, therefore, is invalid.—The conclusion therefore is, that the dissolution in question is valid, but the condition is otherwise. The law is also the same where a stipulation of a *smaller* amount than the original price is made; that is to say, the dissolution holds good, but the condition is void; because, the sale being established with regard to the original price, and the deficiency not then existing, it follows that the dissolution can apply only to what *does* exist,—namely, the original price,—since it is impossible to dissolve what does *not* exist.—If, however, this deficiency be stipulated on account of a defect which had taken place in the wares, it is lawful.—In the opinion of the two disciples, the stipulation of a sum exceeding the original price, in a dissolution, amounts to a *sale*:—according to *Abou Yoosaf*, because (as has been already explained) he considers *Akála* as a *sale*;—and also according to *Mohammed*, because, although he be of opinion that a *dissolution* is a *breaking off*, yet he has said that, in case of the impracticability of a *breaking off*, it must be considered as a *sale*; and as the dissolution in question is of that nature, he is therefore of opinion it is a *sale*.—With respect to a dissolution in which is stipulated an amount less than the original price, *Abou Yoosaf* (proceeding on his general opinion concerning dissolutions,) considers it as a *sale*: but in the opinion of *Mohammed* it is a *dissolution* with respect to the whole of the original price; because he considers the deficiency to be a silence maintained with respect to a *part* of the price; and as the dissolution would have been valid if a silence had been maintained with respect to the *whole*, so it is in a superior degree

valid when the silence is maintained only with respect to a *part*. A dissolution, stipulating a smaller sum than the original price, in a case where the wares have been blemished in the hands of the purchaser, is considered by *Mohammed* as a dissolution; the *deficiency* being opposed to the *blemish*.

Dissolution, in consideration of an equivalent of a *different kind*, is a *breaking off*.

If a dissolution be agreed upon, stipulating, in lieu of the original price, an equivalent of a different kind, it is a breaking off*, according to *Haneefa*, for the *original price*; and the stipulation of a different kind is nugatory. The two disciples consider this dissolution as a *sale*, founding their opinion on their ideas of the nature of dissolutions, as already explained.

The sale of a female slave cannot be annulled after she has borne a child.

If a dissolution of sale take place with respect to a female slave who had borne a child whilst in the possession of the purchaser, it is null, according to *Haneefa*, because (agreeably to his tenets) a *dissolution* is a *breaking off*; and the birth of the child is preventive of a dissolution, as this is a supervenient addition of a separate thing; and such addition, after seizure, prevents a dissolution of the bargain.—This dissolution, however, is considered as a *sale* by the two disciples.

A sale may be dissolved previous to delivery and seizure of the article.

THE dissolution of a sale previous to taking possession of the article sold, whether of a *moveable* or *immoveable* description, is a *breaking off*, according to *Haneefa*. According to *Abou Yoosaf* it is a *breaking off* with regard to *moveable* property only, because a sale of moveable property, previous to taking possession of it, is not lawful, and hence a dissolution with respect to moveable property, previous to the seizure of it, cannot be considered as a *sale*, and is consequently a *breaking off*. A dissolution with respect to *immoveable* property, on the contrary, previous to the taking possession of it, is a *sale*, (accord-

* And consequently valid, as it completely annuls the contract.

ing to *Abou Toosaf*,) as he holds that the sale of immoveable property, previous to the seizure of it, is lawful.

THE loss or destruction of the *wares* is a bar to the legality of a dissolution, but not the destruction of the *price*; because a *dissolution* is the *breaking off of sale*; and the breaking off of a sale rests upon the existence of the sale; and this again relates to the *wares* not to the *price*.

IN cases of *Mookhyeza*, or a sale of goods for goods*, a dissolution agreed upon after the destruction of one of the two subjects is valid; because each of them falls under the description of the subject of the sale; and applying this term, therefore, to the one that remains, it follows that the dissolution is lawful, because of the existence of the subject of the sale.

Barter may be dissolved, after a destruction of one of the subjects.

CHAP. VII.

Of *Moorâbihat*, and *Tawleeat*, that is, *Sales of Profit* and of *Friendship*†.

MOORÂBIHAT, or a *sale of profit*, means the sale of any thing for the price at which it was before purchased by the seller, with the super-addition

Definition of *Moorâbihat* and *Tawleeat*.

* That is, *barter*:—the term by which *Mookhyeza* will be hereafter always expressed.

† *Moorâbihat* and *Tawleeat* are technical terms, which (like many others in this work) do not admit of a literal translation. Neither is the definition of them, as here given (according to the *Persian* version of the *Hedaya*) completely satisfactory. In the *Arabic* copy,

addition of a particular sum by way of *profit*. *Tawleeat*, or a *friendly* sale, is where one person sells any thing to another for the exact price which he himself paid for it. Both these modes of sale are lawful; because the conditions essential to the validity of a sale exist in them; and also, because mankind stand in need of them. For example, a man who has himself no skill in making purchases is necessitated to confide in a purchase from a person skilled in such matters; in other words, he will purchase the article from this person at the same rate at which *he* had purchased it, without allowing him any profit upon it, as in a case of *Tawleeat*, or *friendly* sale,—or, he will purchase it from him, at the same rate at which *he* had purchased it, allowing him an addition, by way of profit, as in a case of *Moorábibat*, or *profitable* sale: and this will leave him satisfied and at ease in his mind; since a person destitute of skill is by either of these modes secured from fraud, whereas, following any *other* mode, he would be exposed to great imposture. Mankind, therefore, having occasion for both these modes, they are both permitted:—and as, in both instances, the purchaser is under a necessity of placing an absolute confidence in the word of the seller, who is skilled in the business of traffic, it is therefore incumbent on the seller to be just and true to his word, and to abstain from fraud, or from the *semblance* of fraud. *Fraud* is where a person avers that he had purchased a certain thing for twelve *dirms*, when, in fact, he had only paid ten *dirms*; and the *semblance* of fraud is where a person sells any thing by a profitable sale,

copy, a *Moorábibat* is defined to mean “a transfer, made by the proprietor, under the original contract, at the original price, with the addition of a profit,”—and *Tawleeat* “a transfer, by the proprietor, under the original contract, at the original price, without an addition of profit.” Hence it would appear that, in a case of *Moorábibat*, the contract [of *Moorábibat*] refers itself merely to the profit agreed for, and not (as in other sales) to the whole price to be paid, since that (exclusive of the profit alone) is determined by the nature of the contract, without specification; and that, in a case of *Tawleeat*, on the other hand, the contract [of *Tawleeat*] refers itself to the original price, since that is fixed at the prime cost, from the nature of the contract.

stipulating

stipulating prompt payment, when, in reality, he had himself purchased the same thing on *credit*.

PROFITABLE and friendly sales are lawful only where the *price* of the wares is of the description of *similars*, such as *dirms* and *deenars*, for instance; because, if the price stipulated be an article of which the unities are not similar, (such as a *slave*, for example,) it follows that the purchaser becomes proprietor of the wares for a price of which the value is unknown, a circumstance which induces illegality in a sale. If, however, the purchaser * should, in the mean time, have acquired possession of the price, (as if, for instance, the price be a *slave*, and that identical slave be then the property of the purchaser) in such case a sale of *friendship* is lawful; and also a sale of *profit*,—provided the *profit* be stipulated in money, or in articles estimable by weight, or measurement of capacity, which are described and ascertained;—because the purchaser is in this case enabled to make delivery of the thing which he has rendered obligatory on himself. It is not lawful, in a sale of this nature, to stipulate a profit proportionate to part of the price, (such as a profit of one *dirm* upon ten, two upon twenty, and so forth;) because the particular value of the price [the slave] not being ascertained, this could not be carried into practice:—it is necessary, therefore, to stipulate a general profit upon the whole price.

They require that the price consist of *similars*; or, if otherwise, that the person who enters into the agreement with the purchaser should have obtained possession of the price in the interim: but the *profit* agreed for must be in money or specific articles of weight, or measurement of capacity, and must be stipulated upon the whole price, generally, and not proportionably upon its parts.

It is lawful for the seller †, in a profitable or friendly sale, to add to the capital sum ‡ the wages of the bleacher, the dyer, or the

All intervening expenses which en-

* Meaning the person who enters into the *Tawleat* or *Mourâbibat* agreement with the first purchaser.

† Meaning the party who first purchased the article, and then agrees to transfer it by *Tawleat* or a *Mourâbibat*: (The terms *seller* and *purchaser* are thus to be understood throughout this section.)

‡ Arab. *Râs Mal*: meaning (In this place) the prime cost or original price of the article.

hance the value of the article may be added to the prime cost.

figurer (of cloths,) the spinner (of cotton or wool,) or the porter (of *wheat*, and so forth;)—because it is a custom amongst merchants to add such expences to the capital sum; and also, because whatever is the cause of an increase either to the *substance* of the thing purchased, or to the *value* of it, is an addition to the capital:—this, moreover, is a general rule, applying to all the articles here mentioned; for the *dying*, *figuring*, or *spinning* is an increase to the *substance* of the article; and the bleaching of linen, or the portorage of *wheat*, and so forth, is an increase to their value, because cloths are rendered more valuable by being bleached, and the price of wheat varies in different places. It is requisite that the seller, in making or including such addition, should say “this article has cost me *so much*,” and not “I have purchased this at such a rate,” because the latter assertion would be false. It is to be observed that the driving of goats from city to city is equivalent to the portorage of wheat; but neither the wages of the shepherd, nor the rent of the house in which the wares are kept, is to be included, as no increase with respect either to the *substance* or the *value* arises from these circumstances:—neither are the wages of a *teacher of the KORAN*, or the like, to be included*, because the increase of value obtained by *instruction* is acquired through the wisdom and ability naturally existing in the scholar, which *last* is the immediate cause of an increase of value:—the charge, therefore, must be placed to the head of the *wisdom*, or *natural ability*, which is the *immediate* cause, and not to the *teaching*, which is a *remote* cause.

In case of an over statement of the price, the purchaser may undo the bargain, or (in *Tawkeet*) deduct the excess.

If, in a sale of profit, the purchaser should discover that the seller had practised a fraud in stating the price of the wares, in such case, according to *Haneefa*, the purchaser is at liberty either to adhere to or undo the bargain, as he pleases; and in case such fraud should be practised in a sale of *friendship*, the purchaser is at liberty to deduct the amount of the fraud from the price. *Abou Yoosaf* is of

* In the sale of a *slave*.

opinion that a deduction proportionate to the fraud must be made in either case; but that, in the sale of *friendship* the deduction is made from the *price*; and in a sale of *profit*, from both the *price* and the *profit*. *Mohammed* maintains that in both cases the purchaser has the option of adhering to or relinquishing the contract as he pleases:—for he argues that the mention of the *price* is to be regarded, as that is known; and the mention of *friendship* or *profit*, is made with a view to incite desire, and is therefore to be considered as the *inducement*, in the same manner as the inducement of security against a blemish or defect; and consequently, if the inducement fail, the purchaser is at liberty with respect to the contract. The argument of *Abou Yoozaf* is that, in cases where friendship or profit are mentioned, it is an essential that friendship or profit be established:—whence it is that the sale in question is concluded, if the seller say to the purchaser, “ I have sold this thing to you, by way of friendship, for its *original price*,”—or, “ I have sold this thing to you for a *profit* on its original price,” provided its original price in both cases be known and ascertained. Now, such being the case, it necessarily follows that a deduction must be made in proportion to the fraud of the purchaser, in order that *Tawleeat* or *Moorábibat* may be established:—in a case of *Tawleeat* the deduction is made from the price; and in a case of *Moorábibat* from the price and the profit. The argument of *Haneefa* is that if, in a sale of friendship, no deduction be made for a fraud, the description of *Tawleeat* no longer appertains to it, since the price, in such a case, must otherwise exceed the *original price*, and consequently the transaction, which is supposed a transaction of *friendship*, would be altered in its nature: a deduction is therefore adjudged:—if, on the other hand, no deduction were made in a *profitable* sale, yet the sale would still retain its original nature of a *profitable* sale, with the difference only of the extent of it; for which reason the purchaser is at liberty to abide by or undo the contract as he pleases. Hence if, in a profitable sale, after the purchaser had become acquainted with the fraud, the wares should be lost or de-

stroyed in his possession,—or, if they should have contracted some blemish preventive of a dissolution of the sale, the purchaser is responsible, according to all the most authentic traditions, for the whole price,—since in such a case no proportion whatever of the original price is opposed to the option of the purchaser, so that he might deduct such proportion, because of the destruction of his option;—as holds in cases of option of inspection or condition of option. It is otherwise in cases of option of *defect*; for there the claim which the purchaser has on the seller relates to a loss with respect to the wares, arising from a defect; and a deduction is accordingly made from the price on account of such loss, provided it be not in the power of the seller in any other way to repair such loss arising from defect.

A profit by a *Moorábibat* sale cannot be twice obtained upon the same article.

If a person purchase *cloth* (for instance,) and afterwards dispose of it to another by *Moorábibat*, and then repurchase it from that other at the price for which he had originally purchased it, in that case, if he should again wish to sell it by *Moorábibat*, it is necessary that he deduct from the price fixed in the *last* sale (calculating that at the rate of price in the *first* sale,) the sums of the profit he acquired in the intermediate sale:—but if after such deduction nothing remain, he is not allowed to sell it by *Moorábibat*. This is according to *Haneefa*. The two disciples maintain that it is lawful for him to sell it with an addition of profit grounded on the last sale. To exemplify this case:—suppose that a person purchases cloth at ten *dirms*, afterwards sells it to another for fifteen *dirms*, and again purchases it from that other for ten *dirms*; in this case, if he should wish to resell it by way of *profit*, he must fix the price at five *dirms*, being what in reality the cloth has cost him, and what he ought therefore to found a profit upon:—suppose, on the other hand, that a person purchases a piece of cloth for ten *dirms*, and having sold it to another for twenty *dirms*, afterwards repurchases it from that other for the original price, namely ten *dirms*; in this case he is not entitled to sell it again with an addition of profit. The two disciples maintain that he is in *both* cases

cases entitled to sell it for a profit on the last price; namely ten *dirms*; and their reasons are, that the repurchase is a *new contract*, and has no connexion with the effects of the *former* sale; and that therefore a profit may be imposed, founded on the *second* contract; in the same manner as if the second purchaser should sell it to a *third* purchaser, and the first purchaser repurchase it from the third one, in which case it would be lawful for the first purchaser to sell it at a profit on the *last* price, and so also in the case in question. The argument of *Haneefa* is, that in the case in question, there is an apprehension of the *first* profit being obtained by means of the second contract, since until the person repurchased the cloth there was a possibility that he might return it upon the seller's hands in consequence of a defect, and that his [the seller's] profit might thereby have been lost, although upon his repurchasing it from the purchaser, this possibility vanishes, and the profit remains confirmed and established. The apprehension, however, had existed; and in *Moorâ-bibat* sales apprehension is regarded as equivalent to certainty, out of caution; (whence it is that a profit of this nature is not allowed upon any thing given in composition; in other words, if a person be indebted to another to the amount of ten *dirms* for instance, and he compound the debt with his creditor by a piece of cloth, it is not lawful for the creditor to sell this cloth at a profit of this nature over and above ten *dirms*, because in the composition it is to be apprehended that the value of the cloth was *short* of ten *dirms*, as composition is founded upon *remission of a part*.)—In the case in question, therefore, the seller, because of the *apprehension* above stated, appears, in consequence of the second contract, to have purchased *five dirms*, together with the cloth, for *ten dirms*; he must therefore deduct *five dirms* from the whole, and declare that “the cloth has fallen to him for “five *dirms*,” and take his profit upon *those five*. It is otherwise where the second purchaser sells the cloth to a *third* person, and the first seller then repurchases it from this person; for in this case the acquisition of the first profit is confirmed and established by means of

the second purchaser's having sold it into the hands of another, and *not* by means of the first seller repurchasing it from the *third* person so as to leave any room for apprehension in *this* case also. There is therefore a material difference between this case, and the case under consideration, and consequently it is evident that the analogy adduced by the two disciples is unfounded.

Case of *Moorábibat* transacted by a privileged slave with his owner.

If a privileged slave, involved in debt, should purchase a piece of cloth for *ten dirms*, and afterwards sell it to his master for *fifteen dirms*, and the master wish to sell the said cloth in the manner of *Moorábibat*, he must set his profit upon *ten dirms*. In the same manner, if a master purchase a piece of cloth for *ten dirms*, and sell it to his privileged slave for *fifteen dirms*, the slave is not entitled to dispose of it at a profit upon more than *ten dirms*. The reason of this is that, in both cases, there is a *semblance* of illegality in the sale; because the property of the slave being, as it were, the property of his master, it appears that the master, in the first case, purchases his own property; and that, in the second case, he sells his own property to himself.

Case of *Moorábibat*, transacted between the manager of a stock, and the proprietor.

If a person give to another *ten dirms*, in the way of *Moorábibat*, stipulating that the profit acquired therefrom shall be equally divided between them, and the *Mozárib*, or manager so constituted, purchase with the said money a piece of cloth, and then sell it to his constituent for *fifteen dirms*, and the constituent afterwards wish to dispose of it by a profitable sale, he is not allowed to fix the price at more than twelve and a half *dirms*. The reason of this is, that although the purchase made by the proprietor of a *Moorábibat* stock from his manager be, in fact, the purchasing of his own property with his own property, yet such purchase is held to be lawful by our doctors; because the proprietor of the stock has no power over it whilst in the hands of the manager; and as this power, which is a desirable object, resulted to him from the purchase, the said purchase, because of its being the means of procuring to him an object of desire,
is

is therefore lawful; nevertheless, as there is in this case an appearance of invalidity of sale, (since the constituent did as it were purchase his own property with his own property, by which means a mutual exchange of respective property did not take place) the purchase is therefore reckoned null so far as regards the half of the profit; and accordingly, in the case in question, the profit must be imposed upon twelve and a half *dirms*.

If a person purchase a female slave, and she afterwards, without any appearance of violence, but merely from a natural cause, become blind of an eye,—or if, being a *woman**, he cohabit with her, without harm accruing,—it is in either case lawful for him to dispose of her by *Moorábibat*, without giving any explanation of either of these circumstances; for neither in consequence of the blindness or the cohabitation does any thing remain to him in opposition to which a deduction might be made from the price; because no part of the price is opposed to the *quality* of the article, (whence it is that if the quality be destroyed previous to seizure by the purchaser, no deduction from the price would on that account be allowed;) and in the same manner, no part of the price is opposed to the use of a woman's person. It is reported, from *Abou Yoosaf*, that in the *first* case the slave must not be disposed of in the manner of *Moorábibat*, without an explanation being given of the *blindness*, any more than where blindness has been occasioned by *violence*: and this opinion has been adopted by *Shaféi*.—It is to be observed, that if the *purchaser himself* had occasioned the blindness, or if it had been occasioned by another from whom the purchaser either had or had not received an amercement, he is not in either of these cases entitled to dispose of the slave by *Moorábibat*, without giving an explanation of the blindness; because

An article may be disposed of by *Moorábibat*, where a defect has intervened not proceeding from the seller, or where the seller has used the article, in the interim, without injury to it:.

but if the defect be occasioned by, or compensated to, the seller, a proportionable deduction must be made from the price.

* Arab. *Sayetba*: in opposition to a *virgin*. The reason for restricting the case to *muliebrity*, in this instance, is that cohabitation with a *woman* is not considered as a depreciation of her value:—contrary to the case of deflowering a *virgin*.

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here the purchaser, (or another,) did with design or intention destroy the eye; and it is consequently requisite that a proportionable deduction be made for a defect so occasioned. The same rule also obtains where a purchaser has cohabitation with a female slave who is a virgin; because *virginity*, being merely a *tender membrane*, is a constituent part of the slave, and this the purchaser has destroyed.

If the article be damaged by an accident not proceeding from the seller, still it is a proper subject of *Moorábibat*.

IF cloth which a person had purchased be burnt by fire, or damaged by vermin, in that case it is lawful for the purchaser to dispose of it by *Moorábibat* without explaining either of these circumstances: but if the cloth be torn in the folding and opening of it, it is not lawful for the purchaser thus to dispose of it without noticing the same to the party, because the damage, in this case, is occasioned by his own deed.

A mistake of a prompt payment instead of a suspended payment, leaves it in power of the purchaser to undo the bargain in a sale either of profit

IF a person, having purchased a *slave* (for instance) for one thousand *dirms*, payable at a future period, should afterwards sell him for one thousand *dirms*, payable *immediately*, with a profit of one hundred *dirms*, without noticing to the other the respite of payment he himself has obtained,—in that case the other, if he should afterwards discover this circumstance, is at liberty either to abide by or undo the bargain at his option; because the suspension of the payment resembles an addition to the substance of the wares; and hence it is a custom amongst merchants, in granting a respite of payment, to increase the price of the merchandise. Now a *semblance*, in a sale by profit, is deemed equivalent to *reality*; and hence it follows that the said person did, as it were, purchase *two* things for one thousand *dirms*, namely, a slave and a suspension of payment; and afterwards sold only *one* of these things by way of profit, grounded on the price which he paid for both; a fraud from which an abstinence is particularly enjoined in cases of *Moorábibat*:—the purchaser, therefore, has an option of adhering to or undoing the bargain as he pleases, as in the option from defect. If, however, the purchaser should destroy the

the wares, and then receive notice of the fraud which had been practised upon him, he is not in such case entitled to make any deduction on that account from the price, because no part of the price is in reality opposed to the suspension of payment.

IF a person, having purchased a *slave* (for instance) for a thousand *dirms*, payable at a future period, should afterwards dispose of him to another, by a *Tawleeat*, for a thousand *dirms* ready money, without intimating the respite of payment, in that case the other, on discovery of this circumstance, is at liberty either to abide by, or annul the contract, as he pleases; because an abstinence from a fraud of this nature is equally enjoined in *friendly* as in *profitable* sales.—If, however, in this case, the purchaser, having destroyed the slave, should then become acquainted with the suspension of payment that had been granted to the seller, it is incumbent on him to make a prompt payment, according to the agreement; nor is he entitled to make any deduction from the price on the score of suspension of payment, as before explained.—It is related, as an opinion of *Abou Yoozaf*, that the purchaser is in this case to pay the *value* to the seller, and to receive from him the whole of the price; in the same manner as holds (according to him) in a case where a creditor, having received payment of the debt due to him in a *bad* specie, discovers this circumstance after having expended them;—in which case he has a right to return to the debtor a similar number of the specie he had received, and to demand from him a like number of *good* specie.—Some have said that an appraisement ought to be made of the value in the case of *prompt* payment, and also in the case of a *distant* payment; and that the difference should be given by the seller to the purchaser.—All that has been here advanced proceeds on a supposition of the suspension of the payment being included in the contract of sale; for if, *without* such stipulation, it should happen that the payment be made at a *distant* period, (as is often the case amongst merchants,) there subsists, in such case, a difference of opinion upon this point, whether, under these

these circumstances, in a subsequent sale of *profit* or of *friendship*, it be incumbent upon him to make known this matter.—Some have said that such notification is incumbent on him, since an established custom is equivalent to a condition.—Others, again, allege that he is under no necessity of giving such notification, since it is evident that, as no condition was stipulated, the sale was therefore for *prompt payment*.

In a sale of *friendship* the rate must be specified;

and the purchaser has a right of option until after the specification.

IF a person dispose of a thing to another by a sale of *friendship*, declaring that “he sells it to him at the rate it had stood him in,”—and the purchaser be not acquainted with that rate, the sale is invalid, from the uncertainty with regard to the price:—if, however, the seller should afterwards inform the purchaser of the rate, at the same meeting, the sale then becomes valid, but it still remains in the option of the purchaser to abide by or recede from the contract as he pleases, since the acquiescence he had before expressed was not fully established, from his ignorance of the price, and after the knowledge of it he has an option, in the same manner as in the case of an option of inspection. The reason of the validity of this sale is that the invalidity does not become firmly established until the departure of the parties from the meeting.—When, therefore, the purchaser, in the meeting, is informed of the price, it becomes the same as if a new contract had taken place after the purchaser had acquired this knowledge; and it is for him to withhold his acquiescence until the end of the meeting.—If, however, the parties should separate, the invalidity then becomes fixed; nor can it be removed by any knowledge which the purchaser may afterwards obtain of the amount of the price.—Similar to this is the case where a person sells cloth for the value which is marked upon it, but of which the purchaser is ignorant; for such sale is invalid, but may be rendered otherwise by the explanation of the seller, before the breaking up of the meeting.

SECTION.

IT is not lawful for a person to sell moveable property, which he may have purchased, until he receive possession of the same; because the prophet has prohibited the sale of a thing prior to the seizure of it on the part of the seller; and also, because there is an unfairness in it, since, if the merchandise should be lost or destroyed before the seizure, the first sale becomes null, and the property reverts to the former proprietor, in which case it must necessarily appear that the person in question has sold the property of another without his consent.

Moveable property cannot be re-sold before seizure:

THE sale of land *, previous to seizure, is lawful, according to *Haneefa* and *Aboo Yoosaf*. *Mohammed* maintains that it is unlawful; because the traditional saying of the prophet before quoted is *absolute*, and not particularly confined to *moveable* property; and also, because of its analogy to *moveable* property. Besides, the *sale* of land is similar to the *hire* of it; in other words, as it is unlawful to *let* land before seizure, so is it likewise to *sell* land before seizure. The reasoning of the two disciples is that, in the case in question, the sale is effected by competent parties with respect to a fit subject;—that there is no *unfairness* in it, since the destruction of *ground* is rare, whereas that of *moveable* property is *probable*;—and that the prohibition of the prophet is founded on the possibility of the unfairness already explained, which does not exist in the case of *land*, the destruction of it being rare.—Some have asserted that a lease of land before seizure, as adduced by *Mohammed*, is lawful in the opinion of the two disciples.—Admitting, however, that it were unlawful according to *all* our doc-

but land may be re-sold previous to seizure by the first purchaser.

* Arab. *Alkâr*; meaning any species of immoveable property. *Zimren* is the term used in the *Persic* version, whence the translator renders it *land*.

tors, it proceeds evidently on this principle, that a lease is made with a view to the produce, the destruction of which not being uncommon, the unfairness already explained (with respect to the sale of moveable property before seizure) may consequently take place in it. This, however, cannot happen with respect to the sale of *ground*, the destruction of which is rare, and consequently the one case is not analogous to the other.

In the re-sale of articles of weight, and measurement of capacity, it is requisite that the article be weighed or measured again by the second purchaser.

If a person purchase articles estimable by a measure of capacity, such as *wheat*,—or articles of weight, such as *butter*,—as if he should say “I have purchased this wheat, on condition of its being equal to “ten bushels,”—or “this butter, on condition of its weighing ten *mans*,”—and if, having measured or weighed these articles accordingly, he should then take them and sell them to another, on the same condition of measure or weight, in that case it is not lawful for that other to sell or use these articles, until he has measured or weighed them on his own account; because the prophet has prohibited the sale of wheat until it be measured both by the buyer and the seller; and also, because there is a possibility of these articles exceeding the warranted quantity; in which case the excess, as being the property of the *seller*, would not be lawful to the purchaser; and an abstinence in the case of this possibility is necessary.—It is otherwise where the sale is made by *conjecture*, without any condition of measurement; for the excess, in that case, is the right of the purchaser; and it is also otherwise in the sale of cloth by yards, for there likewise the excess is the right of the purchaser; since yards (as has been already explained) are a *description* of the cloth, and not a *quantity*, as in the case of articles of weight or measure of capacity.—It is to be observed that the measurement of the cloth by the seller, previous to the sale, is not valid, although it should have been done in the presence of the purchaser, because the measurement of both the *seller* and *purchaser* is required, and these terms are not applicable to the parties until after the sale takes place. So also, the measurement made by the

the seller *after* the sale is invalid, unless it be in the *presence* of the purchaser, because the object of measurement is delivery, and delivery without the presence of the purchaser is impracticable.

If the *seller* only should measure the merchandise *after* the sale, in presence of the purchaser, a question has arisen, whether this be sufficient?—or, whether it be not necessary that the purchaser should also examine it by his own measure?—Some have said that the measurement of it by the seller only, is not sufficient, according to the plain sense of the tradition already quoted. The more approved doctrine, however, is that it is sufficient, since by the measurement of the seller the quantity is ascertained, and delivery completely established. The tradition before quoted alludes to the junction of two contracts; as where, for instance, a person having purchased, measured, and taken possession of a thing, afterwards sell it to another; in which case it is necessary that the second purchaser himself measure it; and the measurement of the first purchaser, who stands in the relation of seller to him, is not sufficient, as will hereafter be more fully explained in the chapter of *Sillim* sales.

It suffices, however, that the article be weighed or measured by the seller, in the purchaser's presence.

It is related as an opinion of the two disciples, that articles of *tale* are analogous to those of *longitudinal measurement*; that is, if a person, having purchased and received articles of this nature on condition of their amounting to a particular number, should afterwards sell them to another on the same condition, there is, in that case, no obligation on that other to enumerate them on his own account, because such articles are not susceptible of usury.—It is related, also, as an opinion of *Haneefa*, that articles of *tale* are similar to those of weight, because in regard to them the receipt of any excess beyond the stipulated number is unlawful to the purchaser: articles of *tale* are therefore analogous to articles of *weight*.

In the re-sale of articles of *tale* or longitudinal measurement, the telling or measuring by the second purchaser is not requisite.

A seller may dispose of the price of his goods without having taken possession of it.

ANY deeds of the seller with regard to the price of the merchandise, prior to the actual receipt of it, such as *gift, sale, hire, or bequest*, is lawful, whether the price be stipulated in *money or goods*;—because the *cause* of legality, namely, *right of property*, is established in the seller; and the act is attended with no unfairness, (such as has been shewn to exist in the case of selling moveable property prior to the receipt of it,) because the price, if expressed in *dirms* and *deennars*, is indeterminate, and is therefore incapable of being destroyed; and if it consist of any thing else, still the sale is not invalidated by a destruction, since the *value* remains due from the seller.—It is otherwise with respect to the article purchased, as the sale of *that* before receipt of it induces fraud, as was before explained.

The parties are at liberty to make any subsequent addition or abatement, with respect either to the goods or the price; and such addition or abatement are incorporated in the contract.

It is lawful for the purchaser to make an increase of the price in favour of the seller; and for the seller to make an increase in the merchandise in favour of the purchaser;—and it is also lawful for the seller to make abatement from the price in favour of the purchaser; and this increase or abatement is incorporated in the original contract; (that is to say, in case of an increase, the *original* and *additional* form of the price^{date of} or the article; and in case of an abatement, what remains after the deduction is the price of the article.) Hence, in the *first* case, the seller possesses a right to the original price, together with the increase superadded to it; and, in the *second* case, the purchaser has a right to the original merchandise with the increase superadded. *Sbafei* and *Ziffer* are both of opinion that such increase is a mere act of *favour*, and therefore cannot be incorporated in the original sale; for, if so, it must necessarily follow that a person gives his own property in exchange for his own property, since, previous to the *increase* of the price, the article was the property of the purchaser in exchange for the original price; and, consequently, if the increase be made in the price, the property of the purchaser is given in exchange for what was before his property: in the same manner, also, in the *second* case, as the price, previous to the increase, was the property of the seller,

it follows that in increasing the wares, he gives his own property in exchange for his own property.—Neither can an *abatement* from the price, by the seller, be incorporated with the original contract; but it must rather be considered as an act of *favour*; because, prior to the abatement, an exchange of the merchandise for the whole of the price had taken place; and it is impossible to set aside any part of the price, since in such case it must follow that a part of the merchandise had no correspondent exchange opposed to it; and this is unlawful.

OBJECTION.—This consequence does not follow; because the remaining sum, after the deduction of the abatement, is considered as an exchange for the whole of the merchandise.

REPLY.—It is impossible to consider the *remainder* as an exchange for the *whole*, because no new contract has taken place with regard to the *diminished* price, and the old contract relates only to the *full* price.

—The reasoning of our doctors is, that the buyer and seller, by means of the increase and abatement, do only alter the contract from one lawful accident to another lawful accident; and that, as the parties possess the power of annulling the contract, they are, *a superiori*, entitled to make an alteration in the non-essential properties of it. The case is therefore the same as if the parties should annul an optional power, or stipulate one after the conclusion of the contract.—Now, since it is lawful for the parties to alter the accident of the contract by means of increase or abatement, it follows that such increase or abatement is incorporated with the original contract; because the accident of a thing adheres to that thing, and does not exist abstractedly of itself. It is otherwise where a seller abates the *whole* price; for such abatement could not be incorporated with the original contract, since in that case a change would take place in regard to what is an *essential property*, and not an *accident* of the contract.—It is also to be observed, that from the increase and abatement being incorporated with the original contract, it does not necessarily follow that a person gives his
own

own property in exchange for his own property, because the original contract does as it were relate to such increase or abatement.—The advantage of the incorporation of the increase and the abatement in the original contract is evident, in a case of *friendly* or *profitable* sale; for if a person sell something by a profitable sale to a purchaser who increases the price in the seller's favour, in that case it is lawful for him [the seller] to charge his profit on the original and the increase united; as, in case of an *abatement*, on the other hand, his profit must be charged on the residue after the deduction.—The advantage arising from this is also evident in a case of *Sbaffa*; for the person possessing the right of *Sbaffa* is entitled to the subject of the sale, in case of an abatement in exchange for the diminished price.

OBJECTION.—Since the abatement and increase are incorporated with the original contract, it would follow that, in a case of *increase*, the person possessing the right of *Sbaffa* is to take the subject of the sale at the aggregate amount of the original price, and its increase,—instead of taking it (as is the case) at the *original* price only.

REPLY.—In case of an increase of the price, the proprietor of the right of *Sbaffa* takes the subject of the sale at the original price only, because his right relates to the original price, and it is not in the power of the buyer and seller, by any act of their's, to annul such right.

The price cannot be increased after the destruction of the goods in the purchaser's hands.

ANY increase of the price, after the destruction of the wares in the possession of the purchaser, is not valid, (according to the *Zâbir-Râwayet*,) because of the wares not having been in a state that admitted of the lawful opposition of an exchange for them.

OBJECTION.—It would appear that the increase of the price remains in force *after* the destruction of the goods; for although the goods be not then in a state to admit any exchange being opposed to them, yet the increase incorporates with the original contract, which was concluded at a time when, the goods being extant, it was lawful to oppose an addition to the exchange for them.

REPLY.

REPLY.—If the wares had remained in a condition to admit of an exchange of property for them immediately, then such exchange might have been immediately established, and referred afterwards to the period of forming the contract; for a thing is first established on the instant, and is then referred to the formation of the contract;—but as, in the present instance, the immediate exchange of the property cannot be established, the wares no longer existing, the reference back is impossible; and hence any increase of the price is evidently invalid.—It is otherwise with respect to an abatement of the price after the destruction of the wares, because these, after their destruction, are in a state which admits of a diminution of the price; which is therefore referred to the formation of the contract.

If a person, having sold something on condition of prompt payment, should afterwards agree to receive the price at a future fixed period, it is lawful, because the price is solely the right of the seller; and as it is in his power, if he chuse, to forego it altogether, he is consequently entitled, for the convenience and ease of the purchaser, to take a *future* payment instead of a *prompt* one, *a fortiori*.—If the period stipulated be not certain, and the uncertainty be *very great*, (as if he should stipulate payment *when the wind blows*, for instance,) it is not lawful. If the period, on the contrary, be only in a *small degree* uncertain, (as if he should stipulate the payment *at the cutting of the corn, or the threshing of it,*) it is lawful, in the same manner as in the case of *baul*, of which an explanation has already been given.

A prompt payment may be commuted for a distant payment.

EVERY debt immediately due may be suspended, in its obligation, to a future period, by the creditor, on the principles laid down in the preceding case,—excepting a *loan**, the suspension of the obligation of

in all debts except those incurred by a loan.

* Arab. *Karz*; signifying a loan of money, in opposition to *Arcuat*, which means a loan of any thing but money. These deeds are considered, by *Mussulmans*, to be of a distinct

of which is not approved.—The reason of this is that the lending of money, is, in the immediate act, equivalent to a loan of any other thing †, and an act of benevolence; (whence it is that if a person should tender a loan of money to another, expressing his intention by the word *Arreat*,—as if he should say, “ I deliver these ten *dirms* as “ an *Arreat*,”—it is valid; and also, that no person who is incapable of any gratuitous act, such as an *infant* or a *lunatic*, is competent to this deed :)—but in the end it operates as an *exchange*, since the borrower gives to the lender an *equal sum*, but not the identical specie he received.—In consideration, therefore, of the *immediate act*, a respite is not binding upon the lender, as there can be no constraint in an act purely gratuitous; and, in consideration of the *end*, the respite is not approved, for in this case the transaction would resolve itself into a sale of money for money, which is *usury*.—It is otherwise, in the *bequest* of a loan for a fixed period; for if a person bequeath the loan of one thousand *dirms* to another, for a year, (for instance,) the performance of this is incumbent on the executor; nor is he entitled to make any demand on the legatee until the expiration of the term, since this bequest is of a *gratuitous* nature, and resembles the bequest of the services of a slave, or the use of a house.

distinct and separate nature. In the one the intention is to destroy the substance of what is borrowed, that is, to spend the identical money received, and afterwards return an equal number of similars. In the other, the intention is to enjoy the usufruct without injuring the substance, which is to be returned in its identical state.

† Literally, “ *ε KARZ* is, in its immediate occurrence, equivalent to an *ARREAT*.”

CHAP. VIII.

Of *Ribba*, or *Usury*.

RIBBA, in the language of the LAW, signifies an excess, according to a legal standard of measurement or weight, in one of two homogeneous articles [of weight or measurement of capacity] opposed to each other in a contract of exchange, and in which such excess is stipulated as an obligatory condition on one of the parties, without any return,—that is, without any thing being opposed to it. The sale, therefore, of two loads of *barley* (for instance) in exchange for one load of wheat does not constitute usury, since these articles are not homogeneous:—and, on the other hand, the sale of ten yards of *Herát* cloth in exchange for five yards of *Herát* cloth is not usury, since, although these articles be homogeneous, still they are not estimable by weight or measurement of capacity.

Definition of the term.

USURY is unlawful; and (according to our doctors) is occasioned by *rate**, united with *species*.—*Shafe'i* maintains that usury takes place only in things of an *esculent* nature, or in *money*.—It is necessary, in order to the operation of the illegality, that the articles be homogeneous; but an equality in point of weight or measurement of capacity annihilates the usury.—It is to be observed that a superiority or inferiority in the *quality* has no effect in the establishment of the usury;

Usury (occasioned by rate united with species) is unlawful.

* It may be necessary here to observe that *rate*, amongst the *Mussulmans*, applies only to articles of weight or measurement of capacity, and not to articles of *longitudinal* measurement, such as *cloth*, or the like.—The phrase here used implies an *inequality of RATE* with a *similarity of SPECIES*.

and hence it is lawful to sell a quantity of the *better* sort of any article in exchange for an equal quantity of an *inferior* sort.

It consists in the sale of an article (of weight or measurement of capacity) in exchange for an unequal quantity of the same article;

THE sale, at an unequal rate, of articles of weight or measurement of capacity, in exchange for homogeneous articles, is usurious, according to our doctors, although the articles be of a description not *esculent*, (such as *loam* or *iron*, for instance;)—because they hold that the *cause* of usury exists, in articles of weight and measurement of capacity, although they be not of an *esculent* nature. *Shafëi* maintains that such sale is lawful, agreeably to his tenets with respect to usury. Supposing, however, the equality of the rate, such sale is lawful in the opinion of all the doctors.—(It is to be observed that *loam* is an article of measurement by *capacity*, and *iron* of *weight*.)

but does not exist where the quantities are not ascertained by some known standard of measurement.

THE sale of any thing not measured out according to the legal standard, at an unequal rate, is lawful. Thus it is lawful to sell one handful of wheat in exchange for two handfuls; or two handfuls in exchange for four;—and also, *one* apple in exchange for *two* apples; because, in such case, the measurement not having been made according to a legal standard, it follows that a superiority of measurement (which is essential to the establishment of usury) has not, according to the rules of measurement, taken place. *Shafëi* maintains that such sale is unlawful; because the article is, in this instance, of an *esculent* nature, which (according to his tenets) is the efficient cause of usury; and also because the equality destructive of usury does not here exist. (It is to be observed that whatever is less than half of a *Sad* is considered equivalent to an handful, since the law has fixed no standard of measure beneath that quantity.)

It is occasioned either by an inequality in point of quantity, or by a suspen-

WHERE the quality of being *weighable* or *measurable* by *capacity*, and correspondence of *species* (being the causes of usury) both exist, the stipulation of inequality, or of a suspension of payment to a future period, are both usurious. Thus it is usurious to sell either *one* measure

sure of wheat in exchange for *two* measures,—or one measure of wheat for one measure deliverable at a future period. If, on the contrary, neither of these circumstances exist, (as in the sale of wheat for money,) it is lawful either to stipulate a superiority of rate, or the payment at a future period. If, on the other hand, *one* of these circumstances only exist, (as in the sale of *wheat* for *barley*, or the sale of one slave for another,) then a superiority in the *rate* may legally be stipulated, but not a suspension in the payment. Thus one measure of wheat may lawfully be sold for two measures of barley, or one slave for two slaves: but it is not lawful to sell one measure of wheat for one measure of barley payable at a future period; nor one slave for another, deliverable at a future period. *Shaf'ei* is of opinion that *correspondence of species* alone does not render illegal a suspension of delivery; because where, in an exchange, a prompt delivery is opposed to a future delivery, there is only a *semblance* of a superiority of rate, founded on the preference given to prompt payment. Now if a superiority of rate, in *reality*, be not preventive of the legality of the sale (as in the case of one slave for two slaves) it follows that the *semblance* only of a superiority is not preventive of such legality, *a fortiori*. The arguments of our doctors are, that wherever either correspondence of species, or the quality of being weighable or measurable exists, the wares are, in one shape, of that description in which usury takes place; and accordingly, a *semblance* of usury takes place in them, which is repugnant to the legality of the sale in the same manner as *actual* usury. The ground of this is what is written in the *Hadees Shireef*, that “articles of different species may be sold in any manner the parties please, provided the bargain be from hand to hand.”

OBJECTION.—Since correspondence of species, or the quality of being weighable or measurable does either of them singly prevent the legality of a suspension of delivery, it would follow that a contract of *Sillim* sale stipulating an exchange of saffron for *dirms* or *deenars*, is invalid, as both are articles of *weight*:—whereas such a sale is valid.

R r 2

REPLY,

tion of repayment; unless the consideration and the return be *heterogeneous*.

REPLY.—The contract is lawful, notwithstanding saffron and *deenars* be both articles of weight, because they do not agree in the *quality* of the weight, as saffron is weighed by *Māns*, and being a subject of *sale* only, is therefore definite by specification; whereas *dirms* and *deenars* are weighed by *stones*, being only *price* and not a *subject* of sale; and therefore do not become definite by specification. In the same manner, also, if a person should sell saffron to another for one hundred *dirms*, ready money, that other may lawfully employ the said *dirms* either in purchase or in any other mode without reweighing them:—whereas, if a person sell saffron, on condition of its being two *Māns*, the purchaser is not afterwards at liberty to dispose of it by sale or by any other mode without reweighing it; as holds with respect to all articles of weight or measurement of capacity. Now it being thus demonstrated that the weight of saffron and other articles is different from the weight of *dirms* and *deenars*, in appearance, substance, and effect, it follows that they do not unite in any circumstance with respect to the quality of the weight; and consequently, that the semblance of usury, in this case, is only an *apprehension* of a semblance, which is not regarded.

All articles ordained by the prophet to be articles of measurement, continue so, notwithstanding any alterations of custom;—and the same of all ordained by him to be articles of weight.

EVERY thing in which the usuriousness of an excess has been established by the prophet on the ground of *measurement of capacity*, (such as *wheat*, *barley*, *dates*, and *salt*,) is for ever to be considered as of that nature, although mankind should forsake this mode of estimation;—and in the same manner, every thing in which the usuriousness of the excess has been established by the prophet on the ground of *weight*, continues for ever to be considered as an article of weight, like *gold* or *silver*; because the custom of mankind, which regulates the mode of measurement, is of inferior force to the declaration of the prophet; and a superior cannot yield to an inferior. (*Abou Yousaf* is of opinion that in all things practice or custom ought to prevail, although in opposition to the ordinance of the prophet; for the ordinance of the prophet was founded on the usage and practice of his own time:—in ordinances,

ordinances, therefore, the prevalent customs among mankind are to be regarded; and as these are liable to alter, they must be attended to, rather than the *letter* of an ordinance.) If, therefore, a person should sell *wheat* in exchange for an equal quantity, by *weight*, or *gold* in exchange for an equal quantity, by a measurement of *capacity*, neither of these sales would be lawful, (according to *Haneefa* and *Mohammed*,) although these modes of weighing wheat and measuring gold should become sanctified by the custom of mankind.

WHATEVER is referred to *Ratls* is considered as an article of *weight*. This the compiler of the *Hedaya* explains to mean that whatever is sold by the *Awkiyat** must be considered as an article of weight; for an *Awkiyat* is a fixed standard of weight in opposition to all other measures of capacity, as none else are standards of weight. Now as every thing sold by the *Awkiyat* comes under the description of an article of *weight*, it follows that if this thing be sold by the measurement of any other vessel not of a fixed standard of weight, opposed to a similar vessel, such sale is unlawful, because of the probability of a disparity of weight, notwithstanding the equality in point of measurement of capacity; for this, in fact, is the same as if one person should sell one article of weight in exchange for another of the same kind and adjust the quantity by conjecture.

All articles referred to any known standard of weight are considered as articles of weight.

It is to be observed that a *Sirf* sale means the sale of price in exchange for price; and price implies *dirms* and *deenars*. In this mode of sale it is a necessary condition that the interchange of properties take place at the meeting, because the prophet has ordained the sale of silver in exchange for silver, from hand to hand,—as shall be explained at large in treating of *Sillim* sales; but in every *other* article, provided it be of that kind in which usury takes place (such as

Note concerning *Sirf* sale.

* This term has been formerly mentioned to signify an ounce. (See Vol. I. p. 24.) From the context, however, it would appear that it also signifies a measure of capacity.

wheat

wheat in exchange for *wheat*, for instance,) the interchange upon the spot is not a condition, it being only required that the article be *specific*. *Sbafēi* maintains that in the sale of wheat for wheat mutual seizure is a condition, because of the ordinance of the prophet, "*Sell it from hand to hand*;" and also because, if one party should make seizure, and not the other, it follows that an appearance of usury takes place, inasmuch as *prompt* payment is superior to *future* payment. Our doctors argue that wheat, as being a determinate subject of sale, does not, like cloth, stand in need of seizure, since the object of the contract is the attainment of a power over the article, which is fully established by its being determinate. It is otherwise with respect to *Sirf* sales, for there the seizure is made a condition in order that the price and subject of the sale may be rendered determinate, which is only to be effected by means of seizure. With respect to the ordinance of the prophet, enjoining the sale from hand to hand, *Obādalāh Bin Sūmat*, has explained it to mean the sale of one determinate thing in exchange for another. Besides, on the postponement of the seizure, no loss is reckoned to result, in the opinion of mankind:—contrary to where a prompt and future payment is stipulated; because the latter in the opinion of mankind is a detriment.

Similar
may be sold
for each
other, with-
out inducing
usury.

THE sale of one egg in exchange for two eggs, from hand to hand, is lawful; and the same with respect to dates and walnuts; because these articles are neither subject to measurement of capacity or weight, with regard to which only usury relates. *Sbafēi*, in this case, differs from our doctors; because usury, according to his opinion, relates to articles of an *esulent* nature, of which kind these are.

Usury can-
not take place
with respect
to *Fālor*, as
they are ar-
ticles of *fak*.

THE sale of one specific *Fālor**, in exchange for two other specific *Fālor*, is valid, according to *Haneefa*. *Mohammed* maintains it to be unlawful; because, as the fitness to constitute *price* is established

* A copper coin. (See Vol. II. p. 305.)

in *Faloos*, with the consent of mankind, it cannot be annulled by any agreement of a seller and purchaser counter thereto; and as the fitness to constitute price still continues, the *Faloos* cannot be rendered determinate by means of a stipulation to that effect in the contract. The case, therefore, becomes the same as if a person should sell one undeterminate *Faloos* in exchange for two undeterminate;—or, as if a person should sell one *dirms* in exchange for two. The reasoning of the two disciples is that this fitness to constitute price in *Faloos* cannot subsist with relation to a buyer and seller, unless by their mutual agreement to that effect*; and, consequently, where they agree to the contrary, the fitness to represent price is, with respect to them, null; nor can the general consent of others, to admit *Faloos* as a representative of price, operate as an argument with respect to them, since in this matter others have no power over them. Hence it follows that, as the fitness to constitute price is, with respect to them, null, the *Faloos* may be identified by their specification.

OBJECTION.—Upon the fitness to constitute price being done away by the agreement of the parties, the *Faloos* will of consequence revert to their primary nature, namely *weight*, (for the *Faloos* was originally a *weight*.)—It would therefore follow that the sale of one *Faloos* for two *Faloos* is not valid, although the fitness to constitute price be done away by the agreement of the contracting parties.

REPLY.—The *Faloos* do not revert to their original nature, because, by the agreement of mankind, they are considered as articles of *sale*, and this agreement remains in force. Hence they stand in the same predicament as *walnuts*, or other articles of *sale*, and the unequal sale of them is of consequence in the same manner lawful.—It is otherwise with respect to *dirms* and *denars*, because these naturally constitute price.—It is also otherwise with respect to the sale of one undeterminate *Faloos* in exchange for two undeterminate *Fa-*

* That is to say, copper coins are not to be considered as price but by a previous agreement of the parties.

loos; for this is, in fact, a stipulation of future payment and future delivery, a species of sale which has been forbidden by the prophet.—It is also otherwise where the stipulation of *one* of the parties relates to undeterminate *Faloos*, for this is equivalent to a postponement of payment, and such postponement is rendered unlawful by homogeneity alone.

*Flour or meal
cannot be sold
for wheat.*

THE sale of wheat in exchange for the *flour* or *meal* of wheat is unlawful, because wheat, and the meal and flour of it, are all of one species.—It is impossible, moreover, to ascertain the equality between those articles by measurement; since flour and meal are of a *close* and *compact* nature, and wheat is not. Hence this kind of sale is essentially invalid, even in the exchange of one measure of the one for one measure of the other.

*Flour may be
sold for flour,*

THE sale of flour in exchange for flour is valid, provided the quantities be equal by measurement, because the condition of legality (namely, *equality*) is here established.

*but not for
meal.*

THE sale of flour in exchange for meal * is not valid, according to *Hanefah*, in any mode; neither at an *equal*, nor at an *unequal* rate; for as it is not lawful to sell flour in exchange for *parched* wheat, or meal in exchange for *raw* wheat, so also it is not lawful to sell either of those articles for the other, because of their homogeneity.—According to the two disciples the sale in question is lawful; because flour and meal are of different species, in as much as the *object* to be derived from each is different; for the object of flour is *bread*, and that of meal is a culinary preparation, mixed up with water or oil.—But the answer to this is that the original object of both is the same, namely, *food*; which is not affected in its nature by the modification

* Arab. *Sowak*. A sort of coarse meal prepared either from *wheat* or *barley*.—Also, what remains after sifting off the fine flour.

of it, since *raw* wheat and *parched* wheat are considered as of the same species, and likewise wheat affected by vermin and wheat that is whole and preserved,—although, in answering particular objects, these kinds be different.

THE sale of flesh in exchange for a living animal is lawful, according to *Haneefa* and *Aboo Yoosaf*. *Mohammed* is of opinion that the sale of flesh in exchange for a living animal of the same species is unlawful, unless the quantity of the dead flesh exceed that of the living flesh, in order that the excess may be opposed in exchange to the other parts of the living animal, independant of flesh; and the remaining part of the slain flesh remain opposed in an equal degree to the living flesh; because otherwise usury must necessarily take place, since, if the quantities of flesh were exactly equal, it must necessarily follow that the other parts of the living animal had no exchange opposed to them;—or if, the quantities of flesh being equal, a deduction be made from the dead flesh, in opposition to the other parts of the living animal, it would necessarily create an inequality in the exchange of flesh for flesh. The sale in question, therefore, resembles a sale of sesame seed in exchange for sesame oil which is unlawful. The arguments of the two disciples in support of their opinion is, that the case in question is in fact the sale of an article of weight for what is *not* an article of weight; since it is not customary to weigh living animals, it being indeed impracticable to ascertain their weight, as they are not at all times of equal weight, an animal being lighter when hungry, and heavier when filled with food.—It is otherwise with oil-seeds, as by weighing those may at once be ascertained the quantity of oil contained in them when separated from the dregs or refuse.

The sale of
flesh for a
living animal
is not usuri-
ous :

THE sale of fresh dates in exchange for dried ones is lawful, according to *Haneefa*. The two disciples hold a different opinion, because of a tradition, in which it is mentioned that a person having interrogated the prophet regarding the legality of such sale, the pro-

nor the sale of
fresh dates for
dried dates.

phet, in return, desired to know whether fresh dates did not diminish in drying?—and upon that person answering in the affirmative, he declared that, such being the case, the sale of fresh dates in exchange for dry ones was not lawful. The arguments of *Haneefa* in support of his opinion are twofold:—FIRST, the word *Tammir*, expressive of *dry* dates, is also applicable to *fresh* dates, because there is a tradition that a person brought some fresh dates from *Kbeebir* to the prophet, who, on their being presented to him, inquired if all the *Tammir* of *Kbeebir* were of that kind? and as fresh and dry dates are from this circumstance held to be of the same kind, it follows that the sale of the one in exchange for the other, on condition of an equality in the rate, is lawful, since the prophet has said, “*Sell TAMMIRS in exchange for TAMMIRS, at an equal rate.*”—SECONDLY, if it be not admitted that fresh dates fall under the appellation of *Tammir*, still the sale is lawful, because of another saying of the prophet, “*When two things are of different species, then let them be sold in whatever manner the parties please.*” In regard to the saying quoted by the two disciples, it rests entirely on the authority of *Zeyd Ibn Abbas*, which is considered weak among the traditionists.—It is to be observed that the same disagreement subsists with respect to the sale of dried and fresh grapes, founded on the same arguments as those already cited. Some have asserted that the sale of *dried* grapes in exchange for *fresh* is unlawful, according to all our doctors, grounding this assertion on the analogy which subsists between this case and that of parched and raw wheat, the sale of which in exchange for each other is universally declared to be invalid.

THE sale of fresh dates in exchange for fresh dates, at an equal rate in point of measurement of capacity, is lawful, in the opinion of all our doctors*.

* The remainder of this case, which is of considerable length, as well as the complete succeeding case, has been omitted in the translation, because the disputations contained in them are founded entirely on verbal criticisms, which do not admit of an intelligible translation.

THE sale of olives in exchange for oil of olives is unlawful, excepting when the actual oil is greater in quantity than the oil contained within the olives, in which case the excess being opposed to the dregs that will necessarily remain after the expression of the oil, prevents the establishment of usury.—The law is the same with respect to the sale of walnuts for the oil of walnuts, of sesamé seeds for the oil of sesamé, of milk for butter, or of the juice of the grape or dates in exchange for grapes or dates. With respect to the sale of cotton in exchange for the thread of it there is a difference of opinion. The sale of cotton, however, in exchange for callico is universally allowed to be legal.

The sale of the manufactured produce of an article in exchange for a similar article, is usurious, unless it exceed that article in quantity.

IT is lawful to sell one species of flesh, in any manner, in exchange for another species of flesh, (such as the flesh of a cow for that of a camel or a goat.) It is to be observed that the flesh of a cow and of a buffalo are of the same species, as is also the flesh of a sheep and that of a goat.

One species of flesh may be sold for another species.

THE milk of a cow and of a goat are of different kinds, and may therefore be lawfully sold in exchange for each other at unequal rates. It is related, as an opinion of *Sbafei*, that these are of the same kind, because the object to be derived from each is the same. But our doctors argue that the flesh of these animals is evidently of a different kind, since it would not be lawful for a person, on whom the gift of a cow in alms was enjoined, to substitute a goat in lieu of a cow, if it prove defective; the milk of these animals, therefore, differs in point of species in the same manner as their flesh. It is to be observed that the vinegar of dates is of a different kind from the vinegar of grapes, because of the difference of their originals. So also, the wool of a sheep is of a different kind from that of a goat, because they answer different objects.

The sale of the milk of one animal for an unequal quantity of milk of another species of animal does not induce usury.

Bread may
be sold for
flour at an
unequal rate.

IT is lawful to sell bread made of wheat in exchange for wheat, or the flour of wheat, at an unequal weight, because bread is considered either as an article of tale or of weight, and consequently is of a different kind from wheat or flour, which are subject to measurement of capacity.—It is related as an opinion of *Haneefa*, that such sale is utterly invalid; but decrees pass according to the first adjudication, and this, whether the delivery of either the wheat or the bread be stipulated to take place at a future period. According to *Haneefa* the borrowing of bread is utterly unlawful,—that is, whether it be considered as an article of tale or weight,—because there is great difference with respect to cakes of bread, either in respect to themselves, or the workmanship of the baker. According to *Mohammed* it is absolutely legal; that is, whether the bread be considered as an article of *tale* or *weight*. According to *Abou Yoofof* it is lawful, if considered as an article of *weight*; but not if considered as an article of *tale*, because of the difference of the unities.

Usury cannot
take place
between a
master and
his slave,

unless the
slave be an
insolvent Ma-
moor;

USURY cannot take place between a master and his slave, because whatever is in the possession of the slave is the property of the master, so that no sale can possibly take place between them, and hence the impossibility of usury.—This proceeds upon a supposition of the slave being *privileged* and *free from debt*; for in the case of a privileged slave who is insolvent, usury may take place between him and his master, according to *Haneefa*, because (agreeably to his tenets) the possessions of such slave do not belong to the master;—and according to the two disciples, because although (agreeably to their tenets) the possessions of such slave be the property of his master, still as the claims of the creditors are connected with them, the slave stands in the same relation to his master as a stranger, and consequently usury may exist in their dealings.

nor between
a *Mussulman*

USURY cannot take place between a *Mussulman* and a hostile infidel,

fidel, in a hostile country.—This is contrary to the opinion of *Abou Yoozaf* and *Sbafii*, who conceive an analogy between the case in question and that of a protected alien within the *Mussulman* territory. The arguments of our doctors upon this point are twofold. FIRST, the prophet has said, “*There is no usury between a MUSSULMAN and a hostile infidel, in a foreign land.*”—SECONDLY, the property of a hostile infidel being free to the *Mussulmans*, it follows that it is lawful to take it by whatever mode may be possible, provided there be no *deceit* used.—It is otherwise with respect to a protected alien, as *his* property is not of a neutral nature, but sacred, because of the protection that has been afforded to him.

and infidel
in a hostile
country.

It may take
place between
a protected
alien and a
Mussulman.

C H A P. IX.

Of *Rights* and *Appendages*.

THE *rights* of a sale are things essentially necessary to the use of the subject of the sale, such as, in the purchase of a house, the right of passing through the road that leads to it; or, in the purchase of a well, the right of drawing water from it.—*Appendages* imply things from which an advantage is derived, but in a subordinate degree, such as a *cook-room*, or a *drain*.

Definition of
rights and *ap-
pendages*, as
connected
with *sale*.

If a person purchase a *Manzil* above which there is another *Manzil*, he is not entitled to the upper *Manzil*, unless he have stipulated the purchase of the *Manzil* “with all its rights, and all its append-

Difference of
rights in a
purchase,
with respect
to a *Manzil*,

“*ages*,”

a *Dár*, and a
Bait.

“ages,”—or, “with every thing great and small upon it, in it, or of it.”—If, on the other hand, a person purchase a *Bait* above which there is another *Bait*, with a stipulation of all its rights, still he is not entitled to the upper *Bait*. But if a person purchase a *Dár* (that is, a *serai*) with its enclosure, he is entitled to the upper stories and the offices; because the term *Dár* signifies a place comprehended within an enclosure, which is considered as the original subject, and of which the upper story is a dependant part. *Bait*, on the contrary, simply signifies any place of residence; and as the upper story of a house is of this nature as well as the under, it cannot be included in the purchase of a *Bait*, unless by an express specification, since a thing cannot be a dependant of its fellow. A *Manzil*, on the other hand, is a mean;—that is, it is greater than a *Bait*, and smaller than a *Dár*;—for although it comprehends every thing necessary to a dwelling-place, still it is deficient in having no place for cattle: a *Manzil*, therefore, is in one respect similar to a *Dár*, and in another respect similar to a *Bait*; and hence, from its similarity to a *Dár*, the upper house is included in virtue of its being a subordinate part, whenever a specification of the rights is made; and, from its similarity to a *Bait*, the upper house is not included in the sale, unless a specification of the rights be made.—Some have said that, in the practice of the present age, the upper house is necessarily included in all the above cases; because a *Bait* (which means a house in the *Persian* language) does necessarily include the upper story.

A porch over a road, connected with a house, is not included in the sale of it, unless it be expressly specified.

A PORCH over a road, of which the beams in one end are laid upon a *Dár* [or *house*] which is the subject of a sale, and in the other end upon the opposite house, or upon a pillar, is not included in the sale of the house, unless a specification of rights be made in the sale; because the porch covering the road is held to be of the same nature as a road.—The two disciples have observed that if the said porch should form the entrance into the house, it is then virtually included in the sale.

If

IF a person purchase a room [*Bait*] in a house [*Dár*] or dwelling-place [*Manzil*,] he is not entitled to the use of the road, unless he have stipulated the rights and appendages, or the *great* and *small* belonging to it.—In the same manner, in the sale of land, a well or drain is not included, unless by a specification of the rights or appendages; because they are *not* considered as a part of the ground, but as a *dependant* on it.—It is otherwise with respect to a *lease*, for *that* virtually includes the well and road without any specification, because the object of a lease is an usufruct, which is not to be obtained but by the use of the road and well; and it is not a custom amongst farmers to rent a *road* or a *well*. But the object of a sale may be answered without the necessity of including the *road* or *well*, since it is customary, amongst purchasers, to sell and trade with the subjects of their purchase, and to dispose of them into the hands of another; whence an advantage is derived from the transaction, without the road or other appendage being included.

The avenue is not included in the purchase of an apartment of a house,—nor wells or drains in the purchase of lands, unless the appendages be expressed in the contract.

CHAP. X.

Of Claim of Right (preferred by other to the Subject of a Sale)

IF a female slave, being sold, bring forth a child whilst in the purchaser's possession, and another person afterwards establish, by witnesses, that she was originally his property, and had not belonged to the seller, such person is entitled to the female slave, and also to the child.

A female slave, claimed after having produced a child whilst in the pur-

chaser's possession, is, together with her child, the property of the claimant, provided the claim be established by evidence:—but if the claim be supported by the purchaser's acknowledgment only, the child is not his property.

child.—If, however, the proof be established by the acknowledgment of the purchaser, the claimant is in this case entitled to the female slave only, unless he also specifically include the child in the claim, in which case the acknowledgment of the purchaser entitles him to both. The distinction between a case of evidence and a case of acknowledgment is, that testimony is absolute proof, being adapted for the elucidation of the fact. By evidence, therefore, it is manifested that the slave belonged to the claimant *ab initio*, that is to say, from a time prior to the purchase of her; and as, at that period, the child was a dependant part of her, (since it had not issued from the womb,) it follows that the claimant has a right to it as well as the mother.—

Acknowledgment, on the contrary, is *defective* proof, since it establishes the right of property of the thing claimed in the claimant, purely from the necessity of verifying acknowledgment; because an acknowledgment is a declaration; and if the establishment of the right of property did not in any degree take place, the declaration must of course be false.—Now this consequence may be prevented by the establishment of the right of property at the time of the acknowledgment; and the child, at that period, not being a dependant part, as having issued from the womb, is therefore not included in the property of the claimant.—Some have said that, in case of the establishment by testimony, when the *Kázee* issues his decree for the claimant to take the slave, the child, from its dependance, is virtually included; and that there is no necessity for a specification of it in the decree. Others, again, have said that the specification of the child is an absolutely necessary condition, of which the adjudication in several analogous cases is a clear proof. Thus *Mohammed* has declared that where the *Kázee* decrees the original to any person, without having any knowledge of the subordinate parts, such subordinate parts are not comprehended in the decree. Where, also, in a case of a claim of right to a female slave, purchased by another, the *Kázee* decrees the slave to the claimant, and it so happens that the child she has brought forth is in the hands

hands of some other person than the purchaser, such child is not comprehended in the decree.

IF a person purchase a slave, and the slave afterwards prove by witnesses that he is free, notwithstanding that, at the time of concluding the contract, he had said to the purchaser "purchase me, for I am a slave,"—and the seller be present, or *absent* at a place that is known, the purchaser is entitled to recover the price from him: but if the seller be absent, and the place of his sojournment unknown, the purchaser is in that case entitled to take the price from the slave, who is to recover the same from the seller whenever it may be in his power.—If, on the contrary, a person accept of a slave in *pawn*, on the ground of the slave saying to him, "accept of me in pawn, for I am a slave," and it afterwards appear that he is free, the pawnee is not in that case at liberty to take payment from the slave of the sum due to him, whether the pawner be absent or present, but must at all events seek it from the pawner. *Abou Yoozaf* holds that the same rule also obtains in the case of *sale*,—that is, that the purchaser has no right, under any circumstances, to an indemnification from the slave, because he has no right to take the price from any but the seller, or his security,—and the slave is neither of these, but merely a *liar*, which does not superinduce responsibility.—The argument of the two disciples is that, in the case in question, the purchaser engaged in the contract on the sole ground of confiding in the slave's declaration, "purchase me, for I am a slave;" and hence it follows, that where a slave has been guilty of a deceit, he is liable for the price, in case the recovery from the seller be impracticable, in order that the injury occasioned by his deceit may be removed from the purchaser. The recovery from the seller, however, is impracticable only in case of his being absent at a place which is not known.—As, moreover, sale is a contract of exchange, it is possible to render the *director* of it responsible for the consideration, (namely, the price,) when the subject is lost or destroyed to the purchaser, this being what a contract of sale

A person selling another as a *slave*, who afterwards proves to be free, must restore the purchase-money:—or if the alleged slave have excited the purchaser to the bargain, he must restore it in defect of the seller.

requires. It is otherwise with respect to *pawn*, as that is not a contract of exchange, but merely a contract of security for the receipt of the substance of the pawnee's right; for which reason it is lawful to give a pawn as security for the price, in a *Sirf* sale, or for the goods, in a *Sillim* sale, although an *exchange* with respect to either of these be unlawful:—in other words, if a pledge should be destroyed whilst in the possession of the pawnee, the pawnee is in that case held to have received the substance of his right;—whereas, if a contract of pawn were in the nature of a contract of exchange, it would follow that in these cases an exchange for the price in a *Sirf* sale, or for the goods in a *Sillim* sale, had been made previous to the seizure, and this is unlawful. The person, therefore, who directs others to enter into a contract of pawn cannot be rendered responsible for the debt to which the pawn is opposed. Analogous to this is a case where the master of a slave says to merchants, “trade with this slave “of mine, for I have privileged him to trade;” and the merchants having traded with him accordingly, it becomes afterwards known that the said slave is the property of another; for in this case the creditors have a right to receive payment of their debts from the master.—It is to be observed that the difficulty, in this case, arises from the tenets of *Haneefa*; for, according to him, a claim is a necessary condition for the establishment of freedom; and here a claim is out of the question, since, if the slave, after the acknowledgment of his slavery, should assert a claim to his freedom, he would be guilty of prevarication; and prevarication is destructive of the validity of a claim. It is therefore impossible that, after his own declaration, his freedom should be made apparent; and hence the statement of this case, according to the tenets of *Haneefa*, is erroneous.—But, in reply to this objection, some have observed that the proper statement of this case is,—that a person purchases a slave at a time when the slave himself said “purchase me, for I am a slave,” and it afterwards appears that the person so purchased was *originally* free; for this statement is strictly agreeable to the tenets of *Haneefa*, since (according to him)

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the claim of freedom is required as a condition only in the case of a *freedman*, and not in that of a person *originally* free.—Others again maintain that the claim of freedom, in *this* statement of the case also, is a necessary condition; and that the prevarication so occasioned is not destructive of the validity of the claim; for generation is a concealed circumstance; and the person not knowing that his mother was free at the time of his generation, he on that account declared himself a slave; but afterwards, attaining a knowledge of his mother's freedom at that period, he therefore claims his freedom.—If it be thus stated, that, a person having purchased a slave, it afterwards appears that the person so purchased was free, *as having been emancipated by his master*, such statement is correct, as it does not involve prevarication, since the master is empowered to emancipate his slave.—This case is therefore, in fact, the same as if a woman should purchase her divorce from her husband, and should afterwards establish, by witnesses, that previous to such bargain he had divorced her three times; or, as if a *Mokâtib* should establish, by witnesses, that, previous to the contract of *Kitâbat*, his master had emancipated him;—for in both these cases the claim and the evidences are admitted, notwithstanding the prevarication; and so also in the preceding case. The ground of this is that the master being competent to emancipate his slave, he may have done it during his absence, and the slave may afterwards have preferred his claim immediately on its coming to his knowledge; and on this supposition the prevarication is not held to be destructive of the claim.

If a person claim a right in a house, in an indefinite manner, and then compound his claim with the possessor of the house for an hundred *dîrims*, and a third person afterwards prove a right to the whole of the house excepting the quantity of a *cubit*, for instance, in that case the possessor of the house has no right to any restitution from the person with whom he entered into the composition; because that person, having before made an indefinite claim without explaining the extent

Case of claim to an immoveable property after a composition with respect to it.

of it, may now lawfully declare it to have been the quantity excepted by the third person.—If, on the other hand, a person, having claimed the *whole* of a house, should then compound with the possessor for an hundred *dirms*, and another person should afterwards lay claim to part of the house, in that case the possessor of the house is entitled to a restitution of a part of the sum he had paid in composition, proportionate to the amount of the second claim.—It is to be observed that a composition of an undefined right for defined property is lawful, because the annulment of an undefined right cannot occasion contention.

SECTION.

Of FAZOLEE BEEA, or the Sale of the Property of another without his Consent.

A sale contracted without authority may be dissolved by the proprietor of the subject.

IF a person sell the property of another without his order, the contract is complete, but it remains with the proprietor either to confirm or dissolve the sale as he pleases. *Shafci* is of opinion that the contract, in this case, is not complete; because it has not issued from a lawful authority; for that is constituted only by *property* or *permission*, neither of which exist in this case. The arguments of our doctors are, that such a sale is a transaction of transfer, performed by a competent person with respect to a fit subject: it is therefore indispensable that the contract be regarded as complete; for, besides that there is no injury in this to the proprietor, (as he has the power of dissolving it,) it is attended with a great advantage to him, inasmuch as it frees him from the trouble of seeking for a purchaser, settling the price with him, and other matters.—Moreover, it is attended with

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an advantage to the seller, whose word it preserves sacred, and to the purchaser, to whom it confirms a bargain, with which, as having voluntarily concluded it, he may be supposed to be pleased.—In order, therefore, to obtain these advantages, a legal power is established in the seller of another's property, more especially as the consent of that other has been given by implication, since a wise man naturally assents to a deed attended with advantage to himself.—It is to be observed that it is requisite that the proprietor give his consent on the condition of the subject of the sale, and the buyer and seller being extant; because, as his assent is a deed relative to the contract, it is necessary, of consequence, when he gives it, that the contract be in existence; and the existence of the contract depends on the existence of the parties, and of the subject of the sale.

WHEN the proprietor of an article, in a *Fazoolie* sale, gives his assent to it, the price becomes his property, and remains in the hands of the *Fazoolie* seller as a deposit, in the same manner as if he had been an agent for sale; because the assent is equivalent to a previous appointment of agency.

If assented to, the price is the property of the proprietor, and a deposit with the *Fazoolie* seller;

It is in the power of the *Fazoolie*, or person who sells the property of another without authority, to dissolve the contract without having obtained the consent of the proprietor. It is otherwise in the case of a *marriage* contracted by a *Fazoolie*, as that cannot be dissolved without the consent of the person on whose account he concluded it.

who is at liberty to dissolve the contract without his concurrence.

It is to be observed that the existence of the parties, and of the subject of the sale, is sufficient towards the consent of the proprietor only in case of the price being in *money*; for, if it be stipulated in *goods*, then the existence of the *price* also is a necessary condition.—In this case, however, the consent of the proprietor is not an assent to the contract of sale, (because the sale is, in this instance, a sort of *purchase*,

chafe, and a *Fazoollee* purchase does not rest upon the assent of the person on whose account the *Fazoollee* made the purchase, inasmuch as the purchase is considered in law to have been made for himself,) but merely an assent to the *Fazoollee* purchaser making over the property he has agreed to give in return for the property which has been constituted the price of it. This price, therefore, consisting of *goods*, becomes the property of the *Fazoollee*, who remains responsible for the subject of the sale, payable in a similar, if it be of a nature that admits of similars,—or, if otherwise, for the value of it.

IF the proprietor should die, then the consent of the heirs is of no efficacy in the confirmation of the *Fazoollee* sale, in either case; that is, whether the price have been stipulated in *money* or in *goods*; because the contract rested entirely on the personal assent of the deceased.

If the proprietor die, and the subject be not specified, the sale is invalid.

IF a person, having given his assent to a *Fazoollee* sale, should afterwards die, and it be not known whether the subject of the sale was extant or not when he gave his assent, in that case, (according to one opinion of *Aboo Yoosaf*, which has been adopted by *Mohammed*,) the sale is valid, because of the probability of the existence of the subject of the sale at the period of assent. *Aboo Yoosaf*, however, afterwards receded from this opinion, and declared this sale to be unlawful, because of the doubt with regard to the existence of the subject of the sale, which in his opinion is destructive of its legality.

The emancipation, by the original proprietor, of a slave usurped and sold by the usurper, is valid.

IF a person usurp a slave, and sell him to another, and, that other having emancipated him, the original proprietor afterwards confirm the sale, in this case the emancipation, according to *Haneefa* and *Yoosaf*, is valid, upon a favourable construction. *Mohammed* maintains that it is not valid, since an emancipation cannot be made except with relation to *property*, in conformity with a tradition of the prophet to that effect; and the purchaser was not proprietor of the slave at the time of the emancipation, because the validity of the sale then rested

rested on the assent of the proprietor; and a suspended sale does not endow with a right of property. Where, moreover, the right of property is confirmed by the master's assent to the sale, it becomes confirmed, first in the usurper and then in the emancipator, by a retrospect and devolution; and a right of property thus confirmed is established in *one* shape but not in *another* shape; and manumission is not valid except where the right of property exists in *every* shape, in conformity with the tradition above cited. Upon this principle it is that emancipation is not lawful where a person, having usurped a slave, gives him his liberty and afterwards makes a retribution to the proprietor;—or, where a person, having purchased a slave, allowing an option to the seller, emancipates him, and afterwards receives from the seller a confirmation of the sale. On the same principle also the *sale* is unlawful, where a person, having purchased a slave from an usurper, sells him again to another, and the proprietor afterwards confirms the sale of the *usurper*;—and emancipation is likewise invalid, where a person, having purchased a slave from an usurper, gives him his liberty, and the usurper afterwards makes a retribution to the proprietor. The argument of the two *Elders* is that, in the case in question, a suspended right of property is established in the purchaser in virtue of an *absolute deed* instituted for the purpose of enjoyment of property, namely, an *absolute sale* without any stipulation of option; and as, in the establishment of this right of property, no injury results to any one, it follows that the emancipation of the purchaser, (which rests upon his right of property,) is also established in suspense, in the same manner as the right of property. When, therefore, in virtue of the assent of the proprietor, the right of property operates, it follows that the suspended emancipation also operates:—in the same manner as where a person purchases a slave in pawn from the pawner, and afterwards emancipates him,—in which case the emancipation remains suspended in its operation, as well as the right of property of the purchaser, until the consent of the pawnee be obtained, or the pawn be redeemed by the pawner:—or, as where an heir emancipates

emancipates a slave belonging to the deceased, at a time when the estate was encumbered with debt,—in which case the emancipation remains suspended in its operation until the debts be liquidated, when it immediately takes place. It is otherwise where an usurper, having emancipated the slave he had usurped, afterwards makes a composition with the proprietor; because usurpation does not entitle to the enjoyment of property:—or, where a purchaser of a slave, under a sale stipulating a condition of option to the seller, emancipates the said slave; because in that case the sale is not *absolute*, and the existence of the option is preventive of the operation of the right of property in the purchaser:—or, lastly, where a person, having purchased a slave from an usurper, sells him to another, and afterwards the original proprietor gives his assent to the sale of the usurper; because in virtue of the assent of the proprietor the right of property vests in the purchaser, upon such assent being signified, *but not before*: the right of property, moreover, of the second purchaser was *suspended*; and consequently, as the right of property vests in the first purchaser *now* (and not *before*,) it necessarily follows that such *suspended* right of property becomes null.

The fine incurred for maiming a slave sold under a usurpation goes to the purchaser, if the former proprietor assent to such sale.

If a person purchase a slave from one who had usurped him, and the slave be maimed * by any person whilst in the possession of the purchaser, and he [the purchaser] exact the fine of trespass from the maimer, and the original proprietor then give his assent to the sale,—in this case the fine is the property of the *purchaser*; because the slave is in such case considered as the property of the purchaser, from the period of the purchase, whence it is evident that he was so at the time of the maiming: and this is an argument against the doctrine of *Mohammed*, exhibited in the preceding case, since as the fine is, in this instance, the right of the purchaser solely in virtue of the establishment of right of property in him from the period of the

* By dismemberment of a limb, such as the *hand*.

purchase,

purchase, it follows that the *emancipation* of the purchaser would be valid for the same reason. The reply of *Mohammed* to this is, that a right of property established in *one* shape only (that is, in an *incomplete* manner) is sufficient to entitle to a fine, but not to the performance of emancipation, which requires that the right of property be *perfect* and *complete*. It is to be observed that although the fine, in this case, be the right of the purchaser, still if it exceed the *half* of the price, it is requisite that he bestow the excess in charity; because the fine for the destruction of the limb cannot exceed half the price, as the *fine of trespass* for maiming a *freeman* is one half of the *fine of blood*, and consequently, the fine for maiming a slave is one half of his *value*. Now nothing can be included in the responsibility beyond what may be opposed to the price, and implicated in it. Any excess, therefore, over *half* the price, is an acquisition to which the proprietor is not entitled, or to which his claim is doubtful, and is therefore not perfectly lawful to him.

If a person purchase an usurped slave, and sell him to another, and the proprietor afterwards give his assent to the first sale, in that case the second sale is invalid; because the right of property then established in the first purchaser destroys the *suspended* right of property of the second purchaser, as has been already explained; and also, because there is an unfairness in it, since it is possible that the proprietor may not give his assent to the sale. But if, after the sale of the slave by the purchaser, he should then either die or be killed, and the proprietor afterwards give his assent to the sale, such assent is not valid; because the existence of the subject of the sale is requisite to the assent, and that no longer exists in either instance.

OBJECTION.—The reason here alleged is a *valid* one where the slave dies a natural death; but it is not so where he is *slain*, because in that case the slave, in virtue of the existence of the *amercement*, is considered, as it were, to be *himself* in existence,—for if a slave, having been sold by a valid contract, should afterwards be murdered whilst

The *refale* of a slave purchased from a usurper is rendered invalid by the proprietor signifying his assent to the *first* sale:

but if the slave perish in the interim the assent is of no account.

in the possession of the seller, still the sale is not null, since the consideration for the subject of the sale (namely the *amercement*) is extant,—whereas, if he die a natural death in the hands of the seller, the sale is null. It would therefore appear that the assent, in case of the *murder* of the slave, is of no effect.

REPLY.—In the case in question it is not possible to consider the fine as the right of the purchaser, since not having been the proprietor of the slave at the period of the murder, he can have no right to the amercement, nor can the slave, in virtue of the existence of the amercement, be considered as extant with respect to him. The slave, therefore, is not extant with relation to him, either *actually* or *virtually*. It is otherwise in the case of a *valid sale*, because there the purchaser had acquired a right of property to the slave which may be transferred to the *consideration* for him; and consequently the slave may be considered as extant with respect to him.

An article purchased through the medium of an unauthorized person cannot be returned to the proprietor, although the purchaser prove the want of authority, or the proprietor's assent to the sale:—but if the seller avow his not being authorized, the sale is null.

If a person sell a slave, the property of another, and the purchaser establish by witnesses that the seller had acknowledged that he had sold him without the assent of the proprietor,—or, that the proprietor had declared that he had not given his assent to the sale, and the purchaser wish to return the slave, the evidence adduced by him is not to be admitted; because there is a prevarication in his plea, since his act of purchasing the slave amounts to a declaration of the validity of the sale, and the plea he afterwards prefers is contradictory of this: his plea, therefore, is not valid; and testimony is to be taken only where the plea it tends to establish is of a valid nature. If, however, the seller should declare before a magistrate that he had made the sale without the authority of the proprietor, the sale in that case becomes null, provided the purchaser desire the dissolution of it, because the inconsistency of the purchaser is no bar to the validity of the declaration of the seller, and when the parties both concur in the same wish the sale is rendered null of course:—but the concurrence of the purchaser is a necessary condition. What is here advanced, that “the
“ evidence

“evidence adduced by the purchaser is not to be admitted,” is the doctrine of the *Jama Sagheer*. The compiler of the *Hedaya* observes that it is mentioned in the *Zeeadat*, that if a person purchase a female slave (for instance) for one thousand *dirms*, and take possession and pay the price, and afterwards, in consequence of another person claiming her as his property, and asserting his right to her, surrender her to him,—and he [the purchaser] establish, by witnesses, that the seller had acknowledged that the slave was the property of the said claimant, the testimony so given is inadmissible. Between these two cases, therefore, there is an evident contradiction, which, however, our modern doctors thus account for. In the case alluded to in the *Jama Sagheer*, the slave was in the possession of the purchaser when he produced the witnesses; but in that from the *Zeeadat* the slave was in the possession of the *claimant* and not of the *purchaser*; and the condition on which a restitution of the purchase-money from the seller is warranted (namely, non-existence of the subject of the sale with relation to the purchaser) not existing in the *first* case, but existing in the *second*, the evidence in the first case is therefore rejected, and in the second it is admitted.

If a person sell a house belonging to another, without his permission, and make delivery of it to the purchaser, and afterwards declare that he had sold it without the permission of the owner, then (according to *Haneefa* and the last opinion of *Abou Yoozaf*) the seller is not responsible*. The first opinion of *Abou Yoozaf* was that the seller is responsible, and this opinion has been adopted by *Mohammed*. This case is one of the examples of usurpation over immoveable property, concerning which there is a difference of opinion, as will be fully explained under the head of *Usurpations*.

In the sale of immoveable property by an unauthorized person, the seller is not responsible.

* Meaning, that the proprietor is not to look to the *seller* for the price of his house, but to the *purchaser*;—or, that the seller is not security for the purchaser.

C H A P. XL

Of *Sillim* Sales.

Definition of
Sillim.

KADOOREE explains *Sillim* literally to signify, a contract involving a *prompt* delivery in return for a *distant* delivery. In the language of the LAW it means a contract of sale, causing an immediate payment of the price, and admitting a delay in the delivery of the wares. In this kind of sale, the wares are denominated *Mooslim-fee-bee* *, the price *Râfal-Mdl* †, the seller *Mooslim-ali-bé* ‡, and the purchaser *Rubul Sillim* §.

A *Sillim* sale
is lawful

A SILLIM sale is authorized and rendered legal by a particular passage in the KORAN, and also by an express declaration of the prophet prohibiting any one from the sale of what is not in his possession, but authorising a *Sillim* sale. It is to be observed that *Sillim* sale is contrary to analogy, because of the non-existence of the subject of it, since it is a sale of a non-existent article, as the subject, in a *Sillim* sale, is merely the thing for which the advance is made, and that does not appear. Analogy, however, is abandoned in this instance, because of the text and tradition above cited.

in all articles
of weight (ex-
cept *dirms*
and *deenars*,)
measurement
of capacity,

A SILLIM sale, with relation to articles of weight, or measurement of capacity, is lawful, because the prophet has said “ *Whosoever enters into a SILLIM sale with you, let him stipulate a determinate weight and measurement, and a determinate period of delivery.*” *Dirms* and *deenars*, however, are not included in the description of articles of

* Literally, *the advanced on account of.* † The *capital* *stock*.

‡ Literally, *the advanced to.* § Literally, *the advancer.*

weight,

weight, because both of these are representatives of price, and in a *Sillim* sale it is requisite that the subject of it be otherwise than a representative of price. Hence if a person should enter into a *Sillim* sale, stipulating the immediate payment of ten yards of cloth to the seller in lieu of ten *dirms* to be delivered to him by the seller at a future period, the *Sillim* sale so contracted is invalid. Some have said that this sale is absolutely null. Others, again, have said that although, considering it as a *Sillim* sale, it is certainly invalid, still it is not *null*, since it may be executed so as to answer the views of the parties as far as possible, by considering it simply as a sale of cloth for a price payable hereafter; more especially since, in all contracts, the *spirit* is what is to be attended to. The former, however, is the better opinion; because, although sales may lawfully be rendered valid in every possible degree, with relation to the things concerned with the parties have contracted, yet as, in the case in question, the things so contracted for are *dirms* and *deenars*, which from an express prohibition are incapable of being made the subject of a *Sillim* sale, the contract with relation to them cannot in *any* degree be rendered valid.

A *SILLIM* sale with respect to articles of *longitudinal* measurement; such as *cloth*, or the like, is lawful, because it is possible to define them exactly by specification of the number of yards in respect to the length and breadth, and the quality and workmanship of it. (By the *quality* is meant the *fineness* or *coarseness*; and by the *workmanship* the looseness or closeness of the texture.) The specification by a recital of these particulars, moreover, is requisite, in order that ignorance may be avoided: it is therefore essential to the validity of the contract. In the same manner also, a *Sillim* sale is lawful with respect to all articles of *sale*, which do not essentially differ in their unities, such as *eggs* and *walnuts*; because, in all articles of *sale* between the unities of which the difference is *trifling*, the rate is ascertainable, the quality definable, and the delivery to the purchaser practicable: a contract of *Sillim*, therefore, with respect to such articles is lawful. In articles of this

longitudinal
measurement,
and sale.

this nature, also, the great and the small are considered as the same, because mankind have agreed in making no account of the difference. It is otherwise with respect to *melons* and *pomegranates*, because the difference in them is considerable. It is to be observed that where there is a difference in the individuals of any kind, it may be known whether such difference be of any account or not by the effect it has on the price. Thus articles of which the individuals of the same kind bear a different price are considered as different; but where the price is the same with respect to the individuals they are considered as similar. It is related, as an opinion of *Haneefa*, that ostrich eggs are not similars, as they bear different prices.

It is to be observed that in the same manner as a *Sillim* contract is lawful with respect to similars of tale according to number, so is it lawful with respect to them according to a measurement of capacity. *Ziffer* has said that it is not lawful according to a measurement of capacity, as that does not apply to articles of tale; and it is also a tenet of his, that a *Sillim* sale with respect to articles of tale is unlawful because of the difference between the individuals of the kind. The reasoning of our doctors is, that quantity is sometimes ascertained by number and sometimes by measurement of capacity; and that similars of the same species being considered as articles of tale only because of the consent and practice of mankind, they may for the same reason be subjected to a measurement of capacity by the consent of the parties. A *Sillim* sale is likewise lawful with respect to *Faloos*. Some have said that this is the opinion of the two disciples; but that *Mohammed* is of a different opinion, since, according to his doctrine, *Faloos* are representatives of price. The doctrine of the two disciples on this head has been already explained in treating of *Usury*.

It is not lawful with respect to animals,

A *SILLIM* sale with respect to animals is unlawful. *Shaf'ii* deems it lawful, as the article may be ascertained by an explanation of the genus, the age, the species, and the quality; after which only a small difference

difference can take place, in the same manner as in the case of cloth. Our doctors, on the other hand, argue that after such explanations the difference may still be great with respect to various qualities and hidden circumstances, which must occasion a contention: in opposition to the case of *cloth*, because, as being the workmanship of *man*, there is rarely any material difference in two pieces of the same kind. Besides, it is recorded in the *Nakl Sabeeb* that the prophet forbade the *Sillim* sale of *animals*; and this prohibition extends to every species of animals, even to *sparrows*.

SILLIM sale is not lawful with respect to the *parts* of an animal, such as the *head*, or the *feet*, because those are not similars of tale, nor is there any measure by which the size of them might be ascertained. In the same manner also, a *Sillim* sale is unlawful with respect to skins, according to number, or *firewood* according to *bundles*, or *hay* according to *packages*, except the quantity be ascertained by specifying the length of the string that ties them; for then the *Sillim* sale with respect to them is lawful, provided the mode of binding be not such as to create a difference.

or the *parts* of animals, or skins, firewood, or hay, unless the quality be ascertained.

A *SILLIM* sale is not lawful, unless the subject of it be in existence, from the conclusion of the contract, until the stipulated period of its delivery. Hence the sale is not lawful if the subject be not in existence at the formation of the contract, but be extant at the period stipulated for its delivery; or *vice versa*;—or if, being extant at the formation of the contract, and the time of delivery, it should have been non-existent at some period of the intervening time. *Sbafei* maintains that the existence at the period of delivery is sufficient, whether the article have been extant before or not; because in this case the seller is capable of delivery at the period on which delivery is required. The arguments of our doctors upon this point are twofold.—FIRST, a saying of the prophet “*Ye shall not sell fruits by way*

nor unless the subject be in continued existence until the time of delivery.

“ of

" of *SILLIM* until their ripeness be apparent," which evidently implies that the capability of the delivery from the formation of the contract is necessary. **SECONDLY**, The capability of delivery is founded on the article being fit to be taken possession of by the purchaser, and it is therefore indispensable that it be in uninterrupted existence from the formation of the contract to the instant of delivery.

If, at the promised period of delivery, the subject of the *Sillim* be lost or disappear, the purchaser has in that case the option of dissolving the contract, and receiving back the price from the seller,—or of waiting until the subject of the sale may be recovered. This is analogous to the absconding of a slave after the sale of him but before the delivery, in which case the purchaser has the power of either dissolving the contract or waiting until the slave may be recovered.

It is lawful with respect to articles which, although perishable in their nature, are kept in a state of preservation,

or in situations where the article may always be had.

A *SILLIM* sale is lawful with respect to dried and salted fish, provided it be according to a standard weight, and the species be known; because in this case the subject of the sale is of an ascertained nature, the quality is defined, and the delivery is practicable, since such fish is always fit to be taken possession of. This species of sale, however, is not allowed according to *tale*, since the individuals amongst fish are not similar:—nor is it allowed with respect to *fresh* fish,—unless at such a particular period of the year as renders the procurement of them certain, in which a *Sillim* sale with respect to them, according to a fixed weight, is lawful, provided the species be defined. The reason of this is that fresh fish is not always to be had, being sometimes withheld, in the winter season, in consequence of the water being frozen. In any *city*, however, where fresh fish are always to be procured, a *Sillim* sale with respect to them is perfectly lawful, provided it be according to *weight*, and not by *tale*.—It is related, as an opinion of *Haneefa*, that it is not lawful to make a *Sillim* sale with regard to the flesh of fish of so large a nature as to occasion their flesh to be cut in the same manner as that of *oxen* or *goats* for instance, because,

cause, being illegal with respect to all other animals, it follows that it is likewise so with respect to *f/b*, of which the flesh is equivalent to that of any other creature.

A *SILLIM* sale of *flesh* is utterly unlawful, according to *Haneefa*. The two disciples maintain that it is lawful with respect to the flesh of quadrupeds, provided a notification be made of the flesh of a known and determinate part, (such as the *baunch*, for instance,) and that a description be given of the *qualities*, (such as *fatness* or *leanness* for instance;) because in this case the weight of the flesh is determined, and the qualities are ascertained,—whence it is that, in case of its destruction, a compensation of a similar is given, and also that it is lawful to borrow it according to weight, and that usury takes place with regard to it. It is otherwise with respect to the flesh of *birds*, for a *Sillim* sale of that is unlawful, since it is impossible to specify the flesh of a particular part, inasmuch as it is not a custom to separate the parts of birds in sale, because of their smallness. The argument of *Haneefa* is that the quantity of flesh is uncertain, because of the difference occasioned by the bones, in regard either to their *number* or *grossness*; and also, because of the difference which takes place with respect to the fatness or leanness, as animals are fat or lean according to the seasons; and as this uncertainty is a cause of contention, such sale is therefore inadmissible;—and for the same reason, the *Sillim* sale of flesh *without* bones is not lawful. This is approved. With respect to the cases quoted by the two disciples of a compensation of a similar being made for flesh in case of its destruction, and of its being lawful to borrow it, the legality of such compensation, &c. is not admitted: but admitting the legality, still the principle on which the compensation of a similar proceeds is evidently because the retribution of a similar is more equitable than that of *money*, since money answers only to the *object*, whereas the *similar* answers both object and appearance; and the legality of borrowing flesh is because

It is not law-
with respect
to *flesh*-meat.

a feizin made by borrowing is an obvious and perceptible one; in opposition to that of a *Sillim* sale, which rests upon *description*.

The period of delivery must be specified.

A *SILLIM* sale is not lawful unless the period for the delivery of the wares be fixed.—*Shafëi* has said that it is lawful in either case; (that is, whether the period of delivery be fixed or not;) since it is recorded in the traditions that the prophet authorized *Sillim* sales in an absolute manner, without any restrictions regarding the limitation of the period. The arguments of our doctors upon this point are twofold.—FIRST, The prophet has ordained that all *Sillim* sales shall be made with a stipulation of a fixed period for delivery.—SECONDLY, The prophet has prohibited man from selling what is not in his possession, but has nevertheless authorized and rendered legal *Sillim* sales, on this principle, that poor people stand in need of such engagements, in order that, by means of the money they receive in advance, they may acquire the subject of the sale, and deliver it to the purchaser.—It is therefore requisite that a fixed period be stipulated, because if the seller were liable to an instantaneous delivery on demand, the principle on which the legality of such sale is founded would not be answered. Moreover, an indefinite period is unlawful, because of the uncertainty; in the same manner as in a sale where the price settled is to be paid at a future period without defining it. It is to be observed that the smallest term that can be fixed for a delivery, in a *Sillim* sale, is one *month*.—Some allege the smallest term to be *three days*; others again fix it at any term exceeding half a day. The *first* opinion is authentic; and decrees are passed accordingly.

Private standards of measurement cannot be used in it.

THE stipulation of a *private* measure of capacity or longitude is not lawful in a *Sillim* sale, because of the uncertainty, founded on the possibility of the criterion being lost in the interval between the conclusion of the contract and the delivery; as has been already explained. It is necessary also that the instrument of measurement be of a substance

stance not liable either to contract or expand, but that it be of a *fixed* nature, such as a *large cup*. Leathern bags, however, (such as those in which water is contained,) are allowable for this purpose, according to *Abou Yoozaf*, because of the practice of mankind.

A *SILLIM* sale, with respect to the grain of a specific village, or the fruit of a specific orchard, is not lawful; for if any accident should happen to these particular places, the delivery becomes impracticable: such practice has moreover been prohibited by the prophet.—This specification is, however, lawful according to some doctors, provided it be to define the *quality*, as where a specification is made of the grain of *Kishmarán* in *Bokhára*, or of *Bashákee* in *Fargána*.

It is not lawful under a restriction of the subject to the produce of a particular place:

A *SILLIM* sale is not lawful, according to *Haneefa*, except on seven conditions. I. That the genus of the subject of the sale be specified, such as *wheat* or *barley*. II. That the species of it be fixed, such as wheat of a soil that is watered by means of a *canal*, or other artificial mode, or wheat of a soil watered by *rain*. III. That the quality of it be fixed, such as of the best or worst kind. IV. That the quantity of it be fixed according to a standard of weight, or measurement of capacity. V. That the period of the delivery be fixed, according to the ordinances in the traditions. VI. That the rate of the capital advanced be fixed, provided it be of a nature definable by a *rate*, as where it is an article of weight, of measurement of capacity, or of tale.—And, VII. That the place of delivery be fixed, provided the subject of the sale, on account of its weight, require *portage*.—The two disciples have said, that if the capital to be advanced be present, and exhibited, there is then no need of any mention of the *rate*; and also, that there is no need of explaining the place of delivery, since the delivery must be made in the place where the contract is concluded. Thus there is a disagreement of opinion with respect to these two conditions between *Haneefa* and the two disciples.—The argument of the two disciples in support of their *former* position, is that as

and requires that the *genus* be specified, and that the *species*, *quality*, *quantity*, *period* of delivery, *rate*, and *place* of delivery, be all determined.

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the price is present and exhibited, the object may be obtained by a reference to it, the case being, in fact, the same as that of *cloth* stipulated as the price, in a *Sillim* sale, of which specification is not a requisite condition, provided it be produced to view and capable of a reference. The arguments of *Haneefa* are twofold. **FIRST**, as it often happens that many of the *dirms* and *deenars* are of a bad kind, and that the purchaser during the meeting is incapable of exchanging them, the seller therefore returns them; and a proportionate deduction being made from the wares, the sale remains extant in a degree proportionate to the sum received by the seller. Now, in this case, and under such circumstances, if the amount of the *dirms* be not known; it follows that it cannot be known in what extent the *Sillim* sale exists. **SECONDLY**, as it sometimes happens that the seller, being incapable of acquiring the subject of the sale, is under the necessity of restoring the price, it follows that if this should not have been explained, it is impossible to judge what sum he ought to return.

OBJECTION.—These two suppositions are merely imaginary, and therefore of no weight.

REPLY.—Imaginations, with respect to *Sillim* sales, are equivalent to realities; because such sales are of but a weak nature, being authorized (as has been already explained) in opposition to analogy.—Hence imaginations with respect to them are of weight; and it is necessary that the price be definite with respect to the rate, provided it be of such a kind as that the contract may relate to a rate; but if it be *cloth*, the specification of a number of yards is not required as a condition, since these are not considered as the *rate*, but the *description*.

—As, also, (according to *Haneefa*,) an explanation of the rate of the price is an essential condition to a *Sillim* sale, it follows that (agreeably to his tenets) a sale of this nature is not lawful where the wares, being of different kinds, (such as *wheat* and *barley*,) are opposed to any specific sum, (one hundred *dirms*, for instance,) without a separate price being specified in opposition to each of the kinds, because
the

the amount being here opposed generally to both, the particular price of each remains unknown.—In the same manner also, it is not lawful where, the price being of different kinds, (such as *dirms* and *deenars*,) an explanation is given of the quantity of *one* of these kinds and not of the *other*; for in this case the contract of *Sillim* is not lawful in the degree to which an unknown quantity is opposed to it; and consequently, it is also invalid with respect to the degree in which it is opposed to a *known* quantity, since one contract relates to both. According to the two disciples both these modes of *Sillim* are lawful, since in their opinion an exhibition of the price without any explanation of the rate is valid.—The argument of the two disciples in support of their *second* position is, that the place of the contract is fixed for the delivery, because the contract, which is the cause of the delivery, did there take place: the case is therefore the same as that of a *borrower* or *usurper*, on each of whom it is incumbent to deliver what he may have borrowed or usurped at the place in which these deeds took place.—The reasoning of *Haneefa* is, that as the delivery of the subject of a *Sillim* sale is not *immediatly* incumbent, the place in which the contract is concluded is not absolutely fixed as the place of delivery.—(It is otherwise in cases of *loan* or *usurpation*, since the repayment of the loan and the restitution of the usurped article are incumbent *upon the instant*.)—Now as the *place of concluding the contract* is not necessarily fixed as the place of delivery, it is requisite that some place be specified, as the uncertainty in this particular may otherwise produce a contention, since the price of goods varies in different places: it is therefore indispensable that a place of delivery be specified by the parties.—Ignorance, moreover, with respect to the place of delivery, is equivalent to uncertainty with respect to the quality of the goods or the quality of the price:—and accordingly, some of our modern doctors have said that if a contention arise between the parties with respect to the place of delivery, then, agreeably to the tenets of *Haneefa*, their oaths must be severally taken, as in the case of a contention regarding the quality of the price;—whereas, agreeably to the

the tenets of the two disciples, their oaths are not to be taken.—Others, again, have said that, agreeably to the tenets of *Haneefa*, their oaths are not to be taken; whereas, agreeably to the tenets of the two disciples, their oaths are to be taken, because, according to them, the place of delivery is virtually involved in the contract itself, and consequently a contention with respect to it induces the necessity of the oaths of both parties, in the same manner as if it related to the goods or price:—and that the delivery, in the opinion of *Haneefa*, not being involved in the contract, but existing only as a condition, is therefore equivalent to a condition of option, or a determination of the period of the payment of the price;—and a contention regarding these does not induce the necessity of the oaths of the parties, but is determined by the affirmation of the seller,

It is to be observed that, in the same manner as *Haneefa* and the two disciples disagree regarding the specification of the place of delivery in a *Sillim* sale, so also they disagree regarding the specification of a place for the payment of the price, (where it is stipulated at a future period,)—the specification of a place for the payment of rent,—and also, the specification of a place for the payment of a sum due from a partner in a division of stock.—An example, with respect to *payment of the price*, appears where a person purchases any thing in exchange for articles of weight or measurement of capacity,—or for some definite price,—in which case, according to *Haneefa*, it is requisite that the place of payment be specified, provided the price be payable at a future period;—whereas, according to the two disciples, such condition is unnecessary, as the place of concluding the contract is absolutely fixed for the payment.—(Some have said that *Haneefa*, in this particular, coincides with the two disciples. This, however, is erroneous, since it is certain that a difference of opinion obtains, as has been already stated; and such, also, is the opinion of *Schimfal-Ayma*.)—An example, with respect to *rent*, appears where a person rents a house, a quadruped, or the like, stipulating the price to consist

list of some article of weight or measurement of capacity, or of some specific article such as is capable of being a debt upon the person,—in which case, according to *Haneefa*, it is requisite that the place of payment of such rent be particularly mentioned,—whereas, according to the two disciples, the mention of it is not requisite, but the house itself is fixed as the place of payment,—or (in the case of hire of an animal,) the place where the hirer returns the animal to its owner.—An example with respect to a division of property, appears where two persons, jointly possessing a house, agree to divide off their shares, and one of them, having obtained a larger portion than he is entitled to, agrees to compound with the other by the payment of a particular sum,—in which case, according to *Haneefa*, the specification of the place of payment is a necessary condition,—whereas, according to the two disciples, this is unnecessary, as the place of concluding the agreement determines the place of payment.

If the article for which the advance is made be of such a nature as does not require any expence of *portage*, such as *musk*, *camphire*, *saffron*, or *small pearls*, there is no necessity, according to all our doctors, for fixing the place of delivery; because the difference of place occasions no difference of price; and in this case the delivery must be made where the contract is concluded.—The compiler of the *Hedaya* remarks that this is the doctrine laid down in the *Jama Sagbeer*, and also in the *Mabsoot* treating of *sales*:—but that in the *Mabsoot* treating of *hire* it is said that the seller may deliver the goods wherever he pleases;—and this is approved; because the delivery is not immediately due; and also, because, all places in this case being similar, there is no necessity for the particular determination of any. Now, the question is, if the parties agree upon a place of delivery, whether it be absolutely fixed thereby or not.—Some are of opinion that it is *not* fixed, because in so determining it there is no advantage.—Others, again, maintain that it *is* fixed thereby, as its being so is advantageous, since the danger of the roads is thereby avoided.—If, in case

The place of delivery, however, need not be determined with respect to articles which are not of expensive carriage:

nor, if a city be mentioned, need the particular street be specified.

case of the goods requiring portorage, a *city* be fixed on for the delivery, there is then no necessity for specifying the particular street or lane, because a city, notwithstanding the variety of its parts, is considered as *one place*.—Some have said that this proceeds on a supposition of the city not being large;—but that, if its extent be a *Farsang**, the specification of a particular part is, in that case, a necessary condition.

The price must be received at the meeting;

A *SILLIM* sale is not valid unless the seller receive the price in the meeting, prior to a separation from the purchaser; because if the price be stipulated in *money*, it would otherwise follow that one debt is opposed to another debt; a practice which has been prohibited by the prophet;—or, if the price be stipulated in *wares*, it is invalid, because the characteristic of *Sillim* is “a prompt receipt of something in lieu of “something to be given,” which would not be established if a prompt delivery of the price did not take place. Besides, the payment of the price is necessary, to enable the seller to acquire the goods, that he may become capable of delivery;—and hence lawyers have said that a *Sillim* sale, containing a condition of option in favour of both or one of the parties, is invalid, because a condition of option is a bar to the completion of the seizure, inasmuch as it prevents the conclusion of the contract in regard to its effect, namely, the establishment of right of property;—and also, that the purchaser has no option of inspection, because it is vain and useless; since the goods are a debt due from the seller, and consequently undetermined; whereas a thing seen becomes determined.—It is otherwise with respect to an option of defect; because that is no bar to seizure;—and hence, if such a stipulation be made, and the parties annul it before the close of the meeting, and the seller be in possession of the price, such *Sillim* sale is valid: in opposition to the opinion of *Ziffer*.

* A *kagur*, about 18,000 feet, or 3½ miles in length.

IF a person purchase a *Koor** of wheat, by a *Sillim* contract, for two hundred *dirms*, and, the seller being indebted to him one hundred *dirms*, he [the purchaser] make the advance by immediately paying to him [the seller] one hundred *dirms*, and opposing the debt of one hundred *dirms* to the remainder,—in that case the contract is invalid in the amount of the debt of one hundred *dirms*,—because a present seizure is not made of them; but it is valid in the amount of the one hundred *dirms* paid down, because of the observance of the conditions of legality with respect to that proportion, and because it is not affected by the invalidity of the other proportion, as such invalidity is supervenient, the sale being valid originally; and hence, if the purchaser, in this case, should pay down one hundred *dirms* on account of the debt before the end of the meeting, the sale becomes valid: but as, in the present instance, the purchaser does not pay off his debt, but merely opposes a *clearance* of his debt in lieu of ready payment of one hundred *dirms*, and the contracting parties separate from the meeting, the sale is therefore invalid in that degree.—The reason of this is, that if a *debt* be established as the price, in a contract of sale, still *that* is not *absolutely fixed* as the price; (whence if a person purchase goods in exchange for a debt due to him by the seller of the goods, and both parties afterwards agree that the debt was *not* due, yet the sale does not become null;)—and since the *debt* is not *absolutely fixed* as the price, so as to be capable of constituting capital stock, it follows that the contract, in such case, does originally take place, and afterwards becomes invalid from that circumstance.

whence if a *debt* owing from the seller to the purchaser be considered as part of it, the sale is invalid in that proportion:

IT is not lawful for the seller to convert to use, or, by any deed, to dispose of the price advanced, in a *Sillim* sale, (as if he should *sell* it, for instance,) prior to his seizure of it, because in this case the seizure of the price, which is an essential condition in a *Sillim* sale, would be

but it cannot be disposed of by the seller until he take possession of it;

* A dry *Babylonish* measure of 7,100. lib.—(See *Richardson's Dictionary*.)

nor can the purchaser perform any act with respect to the goods, until he receive them.

defcated.—In the same manner, also, it is unlawful for a purchaser, in a *Sillim* sale, to perform any act with respect to the goods previous to the receipt of them; because an act with relation to the subject of a sale previous to the seizure is unlawful.—For the same reason, also, it is unlawful for the purchaser, prior to seizure, to admit another to a share in the goods, or to dispose of them at prime cost.

In a dissolution of *Sillim* the stock cannot be applied to the purchase of any thing from the seller until it be first received back.

If both parties agree to dissolve a contract of *Sillim*, the purchaser is not, in that case, entitled to accept or purchase any thing from the seller in exchange for the stock he has advanced, until he has first received it back complete; because the prophet has said, “*Where ye “ dissolve a contract of sale upon which an advance has been made, take “ not from him to whom ye have paid the advance any thing except “ that which ye have advanced to him;*”—and also, because, as the capital advanced, in this instance, is resembling and like unto the subject of the sale, it follows that any act with respect to it, previous to seizure, is invalid.—The reason why the capital advanced *resembles* the subject of the sale is, that a dissolution is equivalent to a new sale with relation to a third person, (that is, to any other than the parties themselves,) and it is therefore necessary that the subject of the sale be extant. Now it is impossible that the goods contracted to be provided can be considered as the subject of the sale, since they are not extant; it is therefore necessary to consider the price in that light; and this consequently becomes a debt due by the seller, in the same manner as the goods were.

OBJECTION.—Since a dissolution is equivalent to a new contract, similar to the first, it would follow that it is indispensable that the advanced capital be received back by the purchaser at the meeting in which the dissolution is determined on, in the same manner as it is requisite that it be advanced to the seller at the time of concluding the contract: whereas it is otherwise.

REPLY.—It is not indispensable that this be received back at the interview

interview of dissolution, because the dissolution is not in all respects similar to the first contract.

—Concerning the case in question *Ziffer* has given a different opinion, for, according to him, any deed relating to the price, previous to the seizure, is lawful :—but the reasoning above stated is a sufficient refutation of this opinion.

If a person sell a *Koor* of wheat by a *Sillim* sale, and afterwards, when the period of delivery arrives, purchase the same from another, and then desire the purchaser to receive it from that other in discharge of his claim upon him; and the purchaser accordingly take possession of the same, still he is not considered to have made seizure of the subject of the *Sillim* sale, and consequently, if the wheat be lost or destroyed whilst in his possession, the seller is responsible for the same. But if the seller should have desired him to receive it first on *his* [the seller's] account, and afterwards on *his own* account, and the purchaser, accordingly, first measure it out and receive it on account of the seller, and afterwards measure it out and receive it on his own account, the subject of the *Sillim* sale is in that case delivered, and the purchaser becomes completely seized of the same. The reason of this is, that there is here a conjunction of two contracts; *first*, the *Sillim* sale; and, *secondly*, the sale between the seller of the *Sillim* sale and the third person; and it is a necessary condition that the measurement take place in both, because the prophet has prohibited the sale of wheat until the measure both of the purchaser and the seller shall have been applied to it; and this prohibition (as has been already explained) evidently alludes to the conjunction of two contracts, such as in the case in question.

OBJECTION.—As the *Sillim* sale is previous to the purchase of wheat made by the *Sillim* seller, it follows that the two contracts are not conjoined.

REPLY.—The *Sillim* contract is antecedent, but the seizure of the subject of it is posterior;—and the seizure here is equivalent to a sale *de novo*; because, although the subject of the *Sillim* sale was a debt

An article subsequently purchased, and made over in fulfilment of a *Sillim* sale, is not held to be delivered,

unless the purchaser receive it first on behalf of the seller, and then make seizure of it on his own account, by two distinct measurements.

incumbent on the seller, and what the purchaser had received was a determinate thing, and consequently, in reality, *different* from a debt, yet they are in this case considered as one and the same thing, lest it should follow that the exchange of the subject of a *Sillim* sale has been made previous to the seizure of it; for if they were to be considered as two things, it would follow that the subject of the *Sillim* sale prior to the seizure of it was given in exchange for what the purchaser made seizure of, namely, a *determinate thing* and not a *debt*.—Now since the seizure is proved to be in the nature of a sale *de novo*, it follows that two contracts are conjoined, namely, the purchase of the wheat by the *Sillim* seller, and the seizure of it by the *Sillim* purchaser, which is equivalent to a sale *de novo*; that is, the case is the same as if the *Sillim* seller, having purchased it from the purchaser, were to re-sell it to the *Sillim* purchaser.

A second measurement is not required in a similar receipt of article by a lender.

If a person, indebted to another in a *Koor* of wheat, not on account of a *Sillim* sale*, but on account of a *loan*, should purchase a *Koor* of wheat from another, and then desire his creditor to receive the same from the other, in lieu of what he had borrowed, and the creditor, having measured out the same, should accordingly take possession of it, such seizure is valid, and a re-payment of the loan is established; because a loan of *indefinite* property [*Karz*] is equivalent to a loan of *specific* property. [*Areaat*,]—and hence the *Koor* of wheat so measured and received by the lender may be said to be his actual right, for which reason the transaction is not regarded as a *conjunction of two contracts*, [with respect to one subject] and it is consequently not requisite that the wheat be measured a *second* time.

If the seller measure the article, on behalf of the purchaser, in his absence, it is not a deli-

If a person, having purchased a *Koor* of wheat by a *Sillim* sale, should order the seller to measure it and put it into his (the purchaser's) sack, and the seller having accordingly measured it out, should put it into the sack at a time when the purchaser is not himself present,

* That is, as an article for which he had received an advance.

present, in this case a delivery of the goods is not held to have taken place, (inasmuch that if the wheat should in that situation be destroyed, the loss falls entirely on the *seller*;) because the purchaser, in a *Sillim* sale, does not become proprietor of the article, for which he makes the advance, until actual seizure, as his right is of an *indefinite* nature and not *determinate*: now the *wheat*, in the case in question, is a *determinate* article, and hence the order given to the seller by the purchaser to measure it out was not valid,—since the order of a director is of no account except with respect to his own property.—Thus the seller, as it were, *borrowed* the sack of the purchaser, and put wheat which was his own property into it;—in the same manner as if a person, having a debt of some *dirms* due to him by another, should give his purse to the debtor and desire him to weigh the *dirms* and put them into it; in which case if the debtor act accordingly, still the creditor does not by the performance of this act become seized of those *dirms*.—If, on the contrary, a person, having purchased wheat that is determinate and present, should direct the seller to measure it, and put it into his [the purchaser's] sack, and the seller act accordingly, at a time when the purchaser is absent, the purchaser is nevertheless seized of the same in virtue of that act, because his directions to the seller were efficient, as the property of the wheat had vested in him in consequence of his purchase of it.—Hence it appears that in a *common* sale the purchaser becomes proprietor of the article previous to the seizure,—whereas, in a *Sillim* sale, the right of property does not vest until after the seizure.—Hence, also, in a *Sillim* sale, if the purchaser desire the seller to *grind* the wheat, put in the manner above recited into his bag, the flour is the property of the seller;—whereas, if the same were to be done in case of a *common* sale, it would be the property of the *purchaser*. In the same manner, also, if the purchaser should desire the seller to throw the wheat into the river, and he act accordingly, then, in a *Sillim* sale, the loss would result to the *seller*,—whereas, in a *common* sale it would fall upon the *purchaser*, and he would remain responsible for the price, since his order was efficient.

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ficient. Hence, in the *Rawdyet-Sabeeh*, it is declared to be sufficient that the seller, by the direction of the purchaser, measure out the article and put it into the purchaser's sack; and there is no necessity for another measurement, since in this case the seller acts as agent for measurement to the purchaser; and the seizure is completely established, because of the falling of the wheat into the purchaser's sack.

—and so also, if it be measured by the seller into his own sack, at the purchaser's instance, although the purchaser be present.

If a person purchase wheat, and direct the seller to measure it out and put it into his own sack, and the seller act accordingly, the purchaser is not seized of it, inasmuch as he borrowed the sack of the seller without taking possession of it, and consequently does not become seized of its contents.—The case is therefore the same as if the purchaser had directed the seller to measure out the wheat and place it in a particular corner of his own house, which being completely in the possession of the seller, the purchaser cannot consequently be seized of any thing in it.

Case of delivery of a determinate article in the same parcel with an undeterminate article.

If an undeterminate and a specific thing be joined together, by a person (for instance) purchasing a specific *Koor* of wheat, and also entering into a *Sillim* contract for another *Koor* of the same (the former of which is *specific* and the latter *undeterminate*), and then directing the seller to measure out both into his own sack, in that case, if the seller first measure the *specific* wheat into the sack, and afterwards the *undeterminate* wheat, the purchase is seized of *both* the measures of wheat;—of the *determinate* wheat, because his directions to the seller with respect to it were efficient, as *it* was his undoubted property;—and of the *undeterminate* wheat, because, upon the seller measuring it out, and placing it in the bag, it then becomes implicated with the property of the purchaser, and on account of such implication the purchaser becomes seized of it.—The case therefore is analagous to where a person, having solicited the loan of some wheat, desires the lender to scatter it on his (the borrower's) ground,—or, where a person consigns his ring to a jeweller with directions to add

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to it more gold, to the weight of half a *deenar*;—for in both these cases the seizure takes place immediately on the implication with the property.—If, on the contrary, in the case in question, the seller first measure out the *undeterminate* wheat, and place it in the purchaser's sack, and afterwards the *specific* wheat, the purchaser does not become seized of either; because his directions to measure out the undeterminate wheat were not efficient, and consequently the property of it remained with the seller, as before:—and having afterwards mixed the *determinate* wheat with his own property, he thereby destroys and annuls the right of property of the other.—This is founded on the doctrine of *Haneefa*, according to whom the implication of the property of another with one's *own* is destructive of the right of property of that other; and on this principle he holds the sale with respect to the determinate wheat to be dissolved.

OBJECTION.—The above implication is with the consent of the purchaser, since it was by his order that the seller made the measurement, and hence the sale ought not in this case to be dissolved.

REPLY.—The implication is not made with the consent of the purchaser, since there is a probability that his object was that the specific wheat should first be measured out.

—What is here advanced is founded on the doctrine of *Haneefa*, as above stated. The two disciples are of opinion that the purchaser has the option of either dissolving the sale or sharing with the seller in the mixed property; because, according to them, the implication of the property of another with one's own is not in all cases destructive of the right of property of that other.

If a person purchase a *Koor* of wheat by a *Sillim* contract, making a female slave the price advanced, and after the seller taking possession of the slave the parties dissolve the contract, and the slave afterwards die whilst yet in the possession of the seller, in this case the seller is responsible for the value she bore on the day of seizure.—If, also, the dissolution be made *after* the death of the female slave, it

If the contract be dissolved, and the article advanced perish before restitution, the seller is responsible.

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is valid, and the seller in the same manner remains responsible for the value at the period of seizure.—The reason of this is that the validity of a dissolution rests upon the existence of the contract, and that, again, rests upon the existence of the subject of it: now, in a contract of *Sillim*, the *article advanced for* is the *subject* of the contract; and as that, in the case in question, still continues in existence, it follows that the dissolution is valid:—and the dissolution being valid, and the contract of *Sillim* consequently cancelled with respect to the article advanced for, it follows that it is also cancelled with respect to the slave, (being the price paid in advance,) as a *dependant* of the article advanced for, although it be not valid with respect to the slave, *originally*, because of her non-existence, since there are many things which, although not valid *originally*, are yet so *dependantly*.—The contract, therefore, being cancelled with respect to the slave, it becomes incumbent upon the seller to return her; but as this is impracticable, he must pay her value.

The dissolution of a sale is rendered invalid by the article perishing before restitution.

If a person, having purchased a slave, should agree with the seller to dissolve the bargain, and the slave afterwards die in his possession, the dissolution is invalid;—or, if the slave die *first*, and the parties *then* agree to dissolve the contract, in this case also the dissolution is invalid;—because, the slave being the subject of the sale, and his death of consequence destroying the existence of the contract, the dissolution is therefore invalid from the beginning in the second case, and becomes invalid in the end in the first case,—as the subject no longer remains. It is otherwise in a case of *Beca Mookáyena*, or *barter*; because a dissolution in that case is valid after the decay or destruction of one of the articles; since either of them being capable of becoming the subject of the sale, the *existing* one is therefore considered as such.

In a dispute with respect to the value of the subject.

If a person enter into a contract of *Sillim* for a *Koor* of wheat, at the rate of ten *dirms*, and the seller afterwards assert that “he had agreed for wheat of an *inferior* sort,” and the purchaser deny this, asserting that “the

“ the stipulation of wheat was made in an *absolute* manner, and “ therefore the contract is invalid,” in such case the assertion of the seller, corroborated by an oath, must be credited, since he pleads the validity of the contract, by virtue of the declaration of a condition of it; and the assertion of the purchaser, notwithstanding his denial of the validity of the contract, is not credited, because it tends to a destruction of his own right, since it is a custom, in *Sillim* sales, that the goods advanced for be *superior* to the sum advanced.—If a *vice versa* disagreement take place between the parties, the learned say that, agreeably to the doctrine of *Haneefa*, the assertion of the *purchaser* is credited, since he claims the validity of the contract.—According to the two disciples, the assertion of the *seller* is credited in both cases, as he is the defendant in both, notwithstanding that, in the latter, he deny the validity of the contract. This will be more fully explained hereafter.

the assertion of the seller (upon oath) must be credited.

If a disagreement take place between the parties to a *Sillim* sale, by the seller asserting that a period of delivery had *not* been determined in the contract, and the purchaser asserting that it had, the assertion of the purchaser must be credited, because a determination of a period for delivery is a right of the seller, and his denial is therefore a wilful injury to himself.

If the seller deny the appointment of a period of delivery, the assertion of the purchaser, fixing that period, must be credited.

OBJECTION.—The seller denies the determination of a period for delivery from a view to his own advantage; since such denial is the cause of annulling the contract, by which means he obtains the property of the goods he had engaged to deliver. Hence his denial is *advantageous* and not *injurious* to himself.

REPLY.—The invalidity of a *Sillim* contract, because of the period of delivery being undeterminate, is not certain, since our doctors have disagreed on this point. The advantage, therefore, in this view, is of no account;—whereas the advantage to the *seller*, from the determination of such period, being obvious, his denial of it thereupon is an injury to himself.—It is otherwise in the case of a disagreement

between the parties with regard to the existence of a condition concerning the quality of the article; because in that instance the invalidity of the contract, from a want of a definition of the quality, is certain.

—If, on the other hand, the seller assert that the period had been determined, and the purchaser deny this, in that case, according to the two disciples, the assertion of the purchaser must be credited, because he denies the right which the seller claims from him, although, at the same time, he deny the validity of the contract;—in the same manner as holds with respect to the proprietor of the stock in a contract of *Moxáribat*;—that is to say, if the proprietor of the stock were to say to his *Moxárib*, or manager, “I stipulated that a half of the profit shall go to you excepting ten *dirms*,” and the manager deny this, and assert that he had stipulated a *half* of the profit in his favour, in this case the assertion of the proprietor of the stock is credited, since he denies the claim of right of the agent, notwithstanding he thereby at the same time deny the validity of the contract between them.—*Haneefa* says that, in the case in question, the assertion of the *seller* is to be credited, because he claims the validity of the contract. Besides, the purchaser and seller both agree in their having made a *Sillim* contract, and consequently they both apparently agree in the validity of it:—but, again, the purchaser, in denying the assertion of the seller, denies the validity of the contract, which is the denial of a thing he at the same time admits, and is consequently not worthy of credit.—It is otherwise in the case of *Moxáribat*, because a contract of *Moxáribat* is not binding upon either the manager or the owner of the stock, since the manager may refuse the execution of the *Moxáribat* at any time, and the constituent may dismiss him when he pleases: such a disagreement, therefore, in the case of *Moxáribat*, is of no consequence, the plea of *invalidity*, in this instance, amounting, in fact, to nothing more than a refusal to carry the contract into execution, which it is lawful for either party to do. There remains, therefore, only the claim to profit on the part of
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the manager; and as this is opposed by the proprietor of the stock; his declaration must consequently be credited.—A *Sillim* contract, on the contrary, is *absolute*, and therefore of a different nature.

—From the above discussion it appears to be a general rule that the assertion of a person who denies his own right, and not the right of another upon him, is not credited in the opinion of all our doctors;—and that whoever pleads the validity of a contract must be credited in his assertion, according to *Haneefa*, provided both parties be agreed in the uniformity of the contract, such as that of *Sillim*, which, whether valid or invalid, is of an *uniform* nature; in opposition to *Mowaribat*, which, in case of its validity, is a contract of participated profit, and in case of its invalidity is merely a contract of hire.—The two scholars are of opinion that, in the case in question, the assertion of the *defendant* must be credited, notwithstanding he thereby deny the validity of the contract.

If a person enter into a *Sillim* contract with respect to *cloth*, describing its length, breadth, and quality of fineness or coarseness, such sale is valid, because it is a contract of *Sillim* which relates to a known thing, and of which the delivery is practicable. If the subject of the sale be a piece of *silk* stuff, it is necessary, in addition, to settle the *weight*, that also being an object in this instance.

In *Sillim* sales of *piece* goods all the qualities must be particularly specified.

A *SILLIM* sale of jewels or marine shells is not lawful, because the unities of these vary in their value.

Sillim sale is not valid in shells, or jewels: but it is valid in small pearls sold by *weight*.

A *SILLIM* sale of small pearls that are sold according to weight is lawful, as the weight ascertains the subject of the sale.

THERE is no impropriety in a sale of *bricks*, whether they be in a wet or dry state, provided a description be given of the mould in which they are formed, because bricks, in their unities, are of a similar nature, more especially where their mould is described.—In short,

in *bricks*,

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and (in short) in all articles which admit a general description of quality, and ascertainment of quantity ;

every thing of which it is possible to comprize a description of the qualities, and a knowledge of the quantity, is a fit subject of *Sillim* sale, as it cannot occasion contention ; on the other hand, a *Sillim* sale is not lawful with respect to things incapable of being defined by a description of quality or quantity ; because the subject of a *Sillim* sale is a debt due by the seller ; and if its quality be not known there consequently exists a degree of uncertainty from which a contention must arise.

or which are particularly defined.

THERE is no impropriety in a *Sillim* sale of pots or vessels for boiling water, or of *boots*, or the like, provided these articles be particularly defined, because the conditions essential to the validity of a *Sillim* sale are here observed :—but if the articles be not defined, the sale is absolutely invalid, the subject of the sale being in such case an undefined debt. It is also lawful to bespeak any of these articles from the workman without fixing the period of delivery.—Thus if a person should desire a boot-maker to make boots on his account, of a particular size and quality, such agreement is lawful, on a favourable construction, founded on the usage and practice of mankind, although it be unlawful by analogy, as being the sale of a nonentity, which is prohibited.

Articles bespoke from the manufacturer, in a contract of *Sillim*, are considered as entities ;

It is to be observed that a contract for workmanship is a *sale* and not merely a *promise*. This is approved. The subject of the sale, moreover, in such case, although in reality a nonentity, is yet considered, in effect, as an *entity* ; and the thing upon which the contract rests is considered as a substance, (that is, as *boots*, for instance) and not as the work of a manufacturer in an *abstracted* manner ;—and accordingly, if the manufacturer bring boots that had been worked by another, or boots which he had himself worked prior to the contract, and the person who had bespoke them should approve of the same, the contract is legally fulfilled.—Besides, articles that are bespoke are not determined for the person who bespoke them

until

until he approve of them; and hence, if the workman should sell them to another before he had shewn them to this person, it is lawful.—All this is approved.

WHOSOEVER bespeaks goods of a workman has the option of taking or rejecting them, because of his having purchased articles which he has not seen.—The workman, however, has no option, inasmuch that the person who bespoke them may, if he please, take them from him by force.—This is recorded by *Mahammed*, in the *Mabfat*, and is the most authentic doctrine.—It is related however, as an opinion of *Haneefa*, that the workman also has an option, inasmuch as it is impossible for him to furnish the articles bespoken without detriment, since in order to make *boots*, (for instance,) it is necessary to purchase hides, and instruments to cut them, and this is not free from loss. It is related, as an opinion of *Abou Yoosaf*, that neither party possesses an option; for the workman, as being the *seller*, is not entitled to an option,—in the same manner as, in a sale of goods unseen, the seller hath no option; and with regard to the person who bespeaks the goods, if an option were given to him it would be an injury to the seller, since if he rejected the goods other people might not chuse to purchase them for the value;—as where, for instance, a commander of high rank bespeaks goods, and the workman accordingly makes them in a style suitable to his rank, and he afterwards rejects them;—in which case the common rank of people would not purchase them for their value.

and may be rejected, if disapproved, upon delivery.

A CONTRACT with a workman for the furnishing of goods is not lawful with respect to such articles as it is not customary among mankind to bespeak,—as *cloth* (for instance,) because the bespeaking of goods is in itself unlawful, and is therefore admitted by the law only so far as it is authorized by the custom of mankind, which is considered as a necessary instrument of its legality.—It is also requisite, in bespeaking articles authorized by the custom of mankind, to describe their

An engagement with a manufacturer to furnish goods which it is not customary to bespeak is not valid.

their *quality*, in order to enable the workman to furnish them accordingly; and unless such description be given, the contract is unlawful.—It is to be observed that the prohibition of a stipulation of a period for delivery, as recited in the first of these cases relative to contracts of this kind, proceeds upon this ground, that if a period were stipulated in a contract for the supply of work of articles authorized by custom, and the price paid immediately to the workman, it would then become a *Sillim* sale in the opinion of *Abou Yoozaf*: in opposition to that, however, of the two disciples, who hold that it would still remain merely a contract for the supply of work:—but if the period should be stipulated in the case of articles not authorized by custom, it then becomes a *Sillim* sale in the opinions of all our doctors.—The reasoning of the two disciples in support of their opinion in the first case is that the word *Iffind* literally means a *requisition of workmanship*, and ought of consequence to be used in that sense, so long as the context does not determinate it to some other sense.

OBJECTION.—The stipulation of a period is a context which clearly indicates that *Iffind* is to be taken in a sense different from its *literal* meaning; and that it is to be understood as implying a *Sillim* agreement; otherwise what need for the stipulation of a period?—It would therefore appear that in such a case it amounts to a *Sillim*.

REPLY.—The stipulation of a period, as in the first case, is not a convincing argument that the word *Iffind* is not to be taken in its literal sense, but ought to be understood as implying an agreement of *Sillim*; because the stipulation of a period may be supposed to have been made with a view to *expedition*,—and it may be supposed that the object of the bespoker, in fixing a period, was to prevent delays: in opposition to the case of things not authorized by custom, for there a contract for a supply of workmanship, as being invalid, is construed to mean a *Sillim* sale, which is lawful.

—The reasoning of *Hancefa* is that, when a period is stipulated, it fixes the subject of the sale to be a *debt*, because periods are not
fixed

fixed except with regard to debts;—and the subject being proved to be a debt, the construction of the contract into a *Sillim* sale is easy and natural. It is therefore construed to be a *Sillim* sale, which is lawful, in the opinion of all our doctors, beyond a doubt; whereas, there is a doubt with respect to the other, since *practice* means the deeds of all people of all countries, and this can never be known with certainty: as, therefore, the legality of a *Sillim* sale is certain, and practice is not free from doubt, it follows that it is preferable to construe a contract for a supply of work to mean a contract of *Sillim*.

SECTION.

MISCELLANEOUS CASES.

IT is lawful to sell a dog or a hawk, whether trained or otherwise. It is related, as an opinion of *Abou Yoosaf*, that the sale of a dog that bites is not lawful;—and *Shafei* has said that the sale of a dog is absolutely illegal; because the prophet has declared “ *the wages of whoredom, and the price of a dog, are in the number of prohibited things*;” and also, because a dog is actual filth, and is therefore deserving of abhorrence; whereas the legality of sale entitles the subject of it to respect; and is consequently incompatible with the nature of a dog. The arguments of our doctors upon this point are twofold. FIRST, the prophet has prohibited the sale of dogs, excepting such as are trained to hunt or to watch.—SECONDLY, dogs are a species of property, inasmuch as they are capable of yielding profit by means of hunting and watching; and being property, they are therefore fit subjects of sale; in opposition to the case of *noxious* animals, such as *snakes* or *scorpions*, which are not capable of yielding use. With respect to

It is lawful to
sell dogs or
hawks.

the

the tradition quoted by *Shafeï*, it applies to the infancy of *Islâm*, at which period the prophet prohibited every one from eating the price of a dog, in order to restrain men from a fondness for dogs, as it was then a custom to keep dogs for breed, and to suffer them to sleep on the same carpet. But when this custom fell into disuse, and men abstained from a fondness for dogs, the prophet ordained the sale of them. With respect to the assertion of *Shafeï*, that dogs are *actual filth*, it is not admitted; but admitting this, still it follows that the *eating*, and not the *selling* of them is unlawful.

It is not law-
ful to sell
wine or pork.

THE sale of wine or pork is not lawful; because, in the same manner as the prophet has prohibited the *eating* or *drinking* of these, so also has he prohibited the *sale* of them, or the eating of the price of them; and also, because these are not substantial property with regard to *Mussulmans*, as has been before frequently explained.

Rules with
respect to
Zimmes in
sale.

ZIMMEES, in purchase and sale, are the same as *Mussulmans*;—because the prophet has said “*Be regardful of ZIMMEES, for they are entitled to the same rights, and subject to the same rules with MUS-*”
“*SULMANS;*”—and also, because, being under the same necessities, in the transaction of their concerns, as *Mussulmans*, they stand in need of the same immunities. They are therefore the same as *Mussulmans* with respect to purchase and sale,—excepting, however, in the sale of *wine* and *pork*, which is lawful to them, as the sale of *wine*, by them, is considered in the same light with that of the crude juice of the grape by the *Mussulmans*; and the sale of *pork* by them is equivalent to that of the flesh of a goat by *Mussulmans*; because these things are lawful in their belief, and we are commanded to suffer them to pursue their own tenets. Moreover, *Omar* commanded his agents to empower the *Zimmes* to sell wine, taking from them a tenth part of the price: a proof that the sale of wine is lawful among them.

IF a person say to another, "sell your slave to a particular person for one thousand *dirms*, on condition that I be responsible to you for five hundred *dirms* of the price, independant of the one thousand *dirms*," and the said person act accordingly, it is valid, and he is entitled to one thousand *dirms* from the purchaser, and to five hundred *dirms* from the security; whereas, if he were simply to say, "I will be responsible for five hundred *dirms*," without mentioning the words "of the price," the seller is, in that case, entitled only to the one thousand *dirms* from the purchaser, and has no claim on the surety.—The reason of this is, that an increase in the price; or in the wares, is lawful, according to all our doctors, and is joined to the original contract, (as has been already explained,) being only an alteration of the contract from one lawful quality to another lawful quality;—and as it is lawful for the *purchaser* to make an alteration in the price, although he be no gainer in other respects by it, (as if he should increase the price, notwithstanding it be adequate to the value of the goods *before* the increase,) so also it is lawful for a stranger to lay himself under an obligation for an increase of price, although he have no advantage in other respects;—in the same manner as the consideration for *Khoola* becomes incumbent upon a wife in virtue of her assent to the *Khoola*, although she receive nothing in exchange, for woman is originally *free*, and the procurement of a divorce adds nothing to her original freedom. It is essential, therefore, to the validity of the seller's claim upon this person, that the increase be opposed to the goods by the specification of the words "of the price;" and if these words be omitted, the declaration or stipulation is of no account.

A person incir-
ing an-
other to sell
his property
to a *third*
person, by of-
fering an ad-
dition over
and above the
price, is re-
sponsible for
such addi-
tion: but not
unless this
addition be
expressed as
forming a
part of the
price.

IF a person, having purchased a female slave, make her over in marriage to another before seizure, and that other cohabit with her, such marriage is lawful, as having been concluded in virtue of the authority of the proprietor:—and it also determines the seizure of the purchaser. If, however, the husband should not cohabit with her,

A female
slave may be
contracted in
marriage by
the purchaser
without his
taking pos-
session of her.

the marriage does not, in that case, determine the seizin according to a favourable construction of the law.—Analogy, indeed, would suggest that the purchaser becomes seized of the slave on the instant of the marriage-contract, since, in consequence thereof, the right of property over the slave is rendered virtually defective;—it would therefore follow that the seizin becomes established as an effect of the contract, in the same manner as in the case of an actual defect occasioned by any act of a purchaser.—The reason for a more favourable construction, on this occasion, is that any act by which an *actual* defect is occasioned infers an exertion of power over the subject, which consequently established a seizin of the subject: but an act which merely induces a *virtual* defect does not admit of this inference, so as to establish seizin.

Case of the purchaser disappearing, without taking possession of his purchase, or paying the price:

If a person, having purchased a slave, should afterwards absent himself without taking possession, or paying the price, and the seller prove by witnesses that he had sold the slave to the absentee, in that case, provided the place of his retirement be known and ascertained, the slave cannot be re-sold on account of the exigences of the seller, for these may be otherwise answered, and such sale would destroy the right of the first purchaser:—but if the absentee's place of retirement be not known, the slave may be re-sold, and the debt of the purchaser to the seller paid by means of the price; for the seller has proved, by witnesses, that the slave is the property of the purchaser, and that he has a claim upon him; and consequently, when the place of retirement of the purchaser is unknown, it is incumbent on the magistrate to direct the slave to be sold for the satisfaction of the seller, which could not otherwise be obtained;—in the same manner as where a pawnor dies before having released his pledge, in which case it is sold for the discharge of his debt to the pawn-holder.—It is otherwise where the purchaser disappears *after* seizin, for in this case the slave cannot be sold to answer the right of the seller, since his right is not particularly connected with the slave, as he, in such a circumstance, stands

stands in the same predicament with the other creditors.—It is to be observed that, in case of the slave being sold on account of the seller, if any thing remain after the discharge of his claim by means of the price, the seller must keep such remainder in behalf of the purchaser, to whom it is due as an exchange for his property:—but if the price should not suffice to answer his claim, he is in that case entitled afterwards to the remainder from the purchaser.—Supposing there be *two* purchasers, and only *one* of them disappear, the one that is present is entitled to pay the whole of the price of the slave, and to take complete possession of him; and if, in this case, the other purchaser afterward appear, he is not entitled to receive his share until he shall have paid to his partner the price of it.—This is the adjudication of *Haneefa* and *Mohammed*. *Abou Yoosaf* has said that, if the *present* purchaser pay the *whole* of the price, still he is only entitled to take possession of his own share, and that, as the payment of the debt of the absentee was a gratuitous and unsolicited act in his favour, he is not entitled to receive it from him, since he paid it without his authority. Besides, as the present purchaser is, as it were, a *stranger* with respect to the absentee, he is not entitled to take possession of his share. The reasoning of *Haneefa* is that the present purchaser, in making payment on behalf of the absentee, acted from *necessity*, and not from *choice*; because it was not otherwise possible for him to enjoy his own share, since, having purchased the slave jointly with the other by one contract, it was impossible for him to detain him in his possession whilst there existed the claim of another with respect to *part* of him. Now whosoever pays the debt of another from necessity is entitled to repayment, notwithstanding his having acted without authority; as in the case of the loan of a pledge; for if a person lend to another something in order that he may pledge it, and that other having pledged it accordingly, the lender afterwards, from a necessary want of the said thing, redeem it from the pawnee, he is, in such case, entitled to repayment from the borrower, although he have redeemed the pledge without authority from him.—Since, therefore, the pre-

or of one of
two pur-
chasers dis-
appearing
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sent purchaser, in the case in question, has a right to repayment from the absentee, it follows that he has also a right to detain in his possession the share of the absentee until he receive payment of the sum due to him; in the same manner as an agent for purchase, who pays from his own property the price of the goods purchased on behalf of his constituent, is entitled to retain possession of them until he receive payment of the price from his constituent.

Cash of gold and silver being indefinitely mentioned in the offer of a price.

If a person purchase a female slave in exchange for one thousand *miskáls* of gold and silver,—saying “ I purchase this slave for one thousand *miskáls* of gold and silver,” in that case it is incumbent on him to pay five hundred *miskáls* of gold, and five hundred *miskáls* of silver; for the reference of the *miskál* to the gold and silver having been in an equal degree applicable to each, an equal proportion in the payment is of consequence incumbent.—If, on the other hand, the purchaser should say, “ I have purchased this slave in exchange for one thousand “ of gold and silver,” in this case he must pay five hundred *miskáls* of gold, and five hundred *dirms* of silver, (of the *septimal* weight;) for the term *one thousand* having been referred to the gold and silver in a general manner, it is therefore construed to apply to the weight in common use with respect to each in particular.

The receipt of base money instead of good money, if it be lost or expended, is a complete discharge.

If a person indebted to another in the amount of ten *dirms* of a good sort, afterwards pay him this amount in an inferior species, and the other, being ignorant of this circumstance, receive them, and afterwards expend them, or lose them, in this case the debt is completely discharged, and the creditor is not entitled to any compensation for the difference of quality.—This is according to *Haneefa* and *Mohammed*.—*Abou Yoesaf* has said, that in this case the creditor is entitled to return to the debtor a tantamount of *dirms* of the sort he received, and to demand from him ten *dirms* of a superior sort, to which he has a right; because, in the same manner as his right relates to

the

the *substance* of the *dirms*, so also is it established in the *quality*. A conservation of *each* right is therefore indispensable: but as the conservation of the *second* right, by means of an allowance in exchange for the difference of quality, is impracticable, (since quality in homogeneous articles is of no relative value,) this mode must necessarily be adopted. The reasoning of *Haneefa* and *Mohammed* is, that the bad *dirms* are of the same species with the good; and that after the receipt and expenditure, or destruction of them, the debt is discharged; because the claim which remains relates to quality, and this is impossible to satisfy by the granting of a compensation, inasmuch as quality in itself bears no value.

If a bird incubate its eggs in the land of a particular person, the right of property over the brood does not, in virtue of such incubation, vest in the proprietor of the ground; on the contrary, they remain free to the person who shall first seize them.—The law is also the same with respect to eggs which a bird lays upon any particular ground.—So also, if a deer should sleep for a night in a field, it does not by that act become the property of the proprietor of that field; on the contrary, it remains free to whomsoever it may be caught by. The reason of this is, that both the young ones and the deer are considered in the nature of *game*, and as such are free to the person who catches them, although no stratagem be used for that purpose;—and the same, also, of *eggs*; whence, if a *Mobrim* should either break or broil them, he is subject to make expiation.—Moreover, the proprietor did not purposely prepare his land that the bird should lay or incubate her eggs, or that the deer should sleep upon it.—It is therefore the same as if a person should spread out his net for the purpose of drying it, in which case, if any game should fall into it, it would not become immediately the property of the proprietor of the net, but would continue neutral until some one seize it;—or, as if game should come into a house, in which case it does not become the immediate property of the proprietor of the house;—or,

Articles of a neutral nature do not become property but by actual seizure.

as if a person, scattering *sugar* or *dirms* (for instance) among the people, should chance to throw these into the clothes of some one; in which case the property does not immediately vest in that person, until he wrap it up or prepare to seize it.—It is otherwise with respect to *honey*, for the property of it vests in the proprietor of the ground in which it is gathered together; because honey is considered as the produce of the ground, and hence the proprietor of the ground obtains a property in it as a dependant of the soil, in the same manner as in the trees which grow in his land, or in water which flows through it.

H E D A R A.

B O O K XVII.

Of S I R F S A L E.

BEEYA SIRF means a *pure* sale, of which the articles opposed in exchange to each other are both representatives of price. This is termed *Sirf*, because *Sirf* means a *removal*, and in this mode of sale it is necessary to remove the articles opposed to each other in exchange from the hands of each of the parties, respectively, into those of the other. *Sirf* also means a *superiority*; and in this kind of sale a superiority is the only object; that is, a superiority of quality, fashion, or workmanship; for gold or silver being, with respect to their substance, of no use, are only desirable from such superiority.

Definition of
Sirf sale.

THE

an *absolute* manner, and not to the ten *dirms* of the *Sirf* sale in a *specific* manner. Our doctors, on the other hand, argue that *price*, in a *Sirf* sale, is also a subject of the sale; because, as every sale must have a subject, and as the articles, in a *Sirf* sale, are both representatives of price, without any of them having a preference over the other, it follows that either of them is the subject; and the sale of the subject previous to the seizure is unlawful.

OBJECTION.—The consideration, in a *Sirf* sale, is a representative of price, and therefore of an undeterminate nature; whence it would follow that it cannot be considered as the subject, since the *subject* of a sale is required to be *determinate*.

REPLY.—The subject of a sale is not required to be determinate; for, in a *Sillim* sale, the thing on account of which the advance is made is the subject of the sale; but still it is undeterminate.

Gold may be sold for silver, by conjecture; but not gold for gold, nor silver for silver.

THE sale of gold for silver, by conjecture*, is lawful, because equality, in a sale of this nature, is not required.—It is unlawful, however, to sell *gold* for *gold*, or *silver* for *silver*, by conjecture, because in such sale there is a suspicion of usury.

In the sale of an article having any gold or silver upon it, the price paid down is opposed to the gold or silver.

IF a person sell, for two thousand *Miskáls* of silver, a female slave whose real value is one thousand *Miskáls*, and on whose neck there is a collar of silver equivalent to one thousand *Miskáls* of silver, and the purchaser having paid a thousand *Miskáls* of silver, ready money, the parties then separate from the meeting, such payment is considered to be the price of the collar, because the seizure of so much of the price of the whole was a necessary condition, as the sale in that proportion was a *Sirf* sale; and hence it is reasonable to conclude that the seller paid the exact amount of which he knew the seizure to be indispensably necessary. In the same manner, also, if he purchase the said slave with the collar, for two thousand *Miskáls* of silver, of which one thousand is prompt and the other thousand postponed, the prompt payment is considered as

* That is, by a loose undeterminate estimate.

the price of the collar, because the stipulation of payment at a future period not being lawful in a *Sirf* sale, and being permitted in the sale of a slave, it is reasonable to suppose that the parties, in contracting the sale, and stipulating the distant period, intended to proceed according to law.—If, also, a person sell, for one hundred *dirms*, a sword, of which the silver ornaments amount to fifty *dirms*, and the purchaser pay immediately fifty *dirms* of the price in prompt payment, such sale is lawful, and the payment made is considered to be for the price of the ornaments, although the purchaser may not have specified this.—The same rule, also, holds if the purchaser say to the seller, “ Take these “ fifty *dirms* in part of the price of *both*,” (that is, of the ornaments and sword,) because two things are sometimes mentioned where only one is intended, and this supposition is here adopted from the probability of it. If, however, the parties separate without a mutual seizure, the sale is null with respect to the silver ornaments, because of its being in that degree a *Sirf* sale, to the validity of which mutual seizure is essential:—or, if the sword be so framed as not to admit a separation of the ornaments without sustaining detriment, the sale of it is in this case also null, because so situated the separate sale of it is not permitted, in the same manner as it is not permitted to sell the beam of a roof.—If, on the other hand, the sword admit of a separation of the ornaments, without detriment, the sale, in the manner above-mentioned, is valid with respect to the *sword*; but with respect to the *ornament* it is null.—It is to be observed that the sale of a sword with silver ornaments in exchange for *dirms* is lawful only where the silver of the *dirms* exceeds that of the ornaments; and that, if the silver of the *dirms* be either barely *equal* to, or *less* than, that of the ornaments,—or, if it be not *known* whether it be more or less, the sale is invalid. The reason of the invalidity in case of its not being known whether it be more or less is, that the probability is in favour of its being invalid; since there are two causes of invalidity, namely, *equality* and *inferiority*; whereas there is only *one* cause of validity, viz. *superiority*.

In the purchase of plate, if the parties separate before payment of the full price, the sale is valid only in the proportion paid ;

IF a person, having sold to another a silver vessel, should receive payment in part, and both parties then separate, in that case the sale is null with respect to the amount remaining to be paid, but valid in the amount taken possession of ; and the parties have each a share in the property of the vessel ;—because this sale is *Sirf*, or *pure*, with regard to the whole of the subject, and consequently valid in that degree in which the conditions of a pure sale have been observed, and invalid in the degree in which they have been omitted ; for the invalidity, in this case, is not *essential*, but *accidental*, inasmuch as the sale was valid in its formation, and afterwards, in consequence of the separation of the parties after the receipt of a *part*, became invalid with relation to part of the subject ; and hence the invalidity, which is accidental, does not operate upon the part in which all the conditions of the sale have been observed.

or, if it be discovered to be in part the property of another, the purchaser may relinquish the bargain :

IF a person sell a silver vessel which afterwards appears to be in part the property of another, in that case the purchaser has the option either of retaining a right of property in the remaining part of the vessel, or of cancelling the bargain entirely ; because partnership in a vessel is equivalent to a *blemish* in it.

(but this does not hold with respect to an *ingot*.)

IF a person sell an ingot of silver, and part of it afterwards appears to be the property of another, the purchaser is in that case constrained to take the remaining part at a proportionate price :—and he is not allowed an option, in this instance, because the division of an ingot of silver does not in any shape injure it.

Where the article, on each side, consists of two species of money, the sale at an unequal rate is lawful ;

THE sale of two *dirms* and one *deenar*, in exchange for two *deenars* and one *dirm*, is valid ; because in this case the *dirms* are considered as opposed to the *deenars* ; and as they are of a different genus, an inequality in the proportion is therefore admitted. *Shafëi* and *Ziffer* maintain that this sale is unlawful ; and they have disagreed in the same manner with respect to the legality of the sale of one *Koor* of barley and

and one *Koor* of wheat in exchange for two *Koors* of wheat and two *Koors* of barley. Their reasoning in support of their opinion is that the feller and buyer have opposed one total to another total; and this requires that every separate part of the one be opposed to every separate part of the other, (in an *indefinite* and not a *definite* manner;)—now in the opposing of each genus, respectively, to a different genus, a modification is induced in this particular, which is not lawful, notwithstanding such a construction of the sale be the means of rendering it valid.—In the same manner as where a person, for ten *dirms*, purchases a silver bracelet weighing ten *dirms*, and again, for other ten *dirms*, purchases a piece of cloth, and then disposes of both articles together, by a *Moorábibat* contract, (suppose) for thirty *dirms*, in which case the *Moorábibat* sale is invalid, although it be possible, by supposing the whole of the profit to be exacted on the *cloth*, to render it valid:—or, where a person purchases a slave for one thousand *dirms*, and, previous to the payment of the price, sells him, along with another, for fifteen hundred *dirms*, to the person from whom he had bought the slave for one thousand *dirms*; for in this case the sale is invalid in relation to the slave of a thousand *dirms*, because there is a possibility that the other slave may have been worth more than five hundred *dirms*; and supposing this, it necessarily follows that the seller has purchased the slave for a smaller price than that for which he formerly sold him; although in this case it be possible to render the sale valid by supposing the one slave to be opposed to one thousand *dirms*, in a specific manner, and the other to five hundred *dirms*, so as to remove the possibility of the seller having received him at a smaller price than that for which he had sold him:—or, where a seller, having exhibited two slaves, of which *one* only is his property, says to the purchaser, “ I have sold to you one of these slaves,” in which case the sale is invalid, notwithstanding it be possible to render it valid by supposing that the seller meant his own slave:—or, where a person sells a *dirm* and a piece of cloth for a *dirm* and a piece of cloth, and both parties then separate without making seizure,—in which case the sale is invalid

valid, although it be possible to render it valid by supposing the *dirms* on each side to have been opposed to the cloth of the other :—for, in all these cases, although there be a possibility of rendering the sales valid, still they remain invalid, for the reason already alledged. The arguments of our doctors are, that the opposition of a total to a total, provided it be in an *absolute* manner, (that is, without any particular specification,) admits of this supposition, that the separate parts are opposed to the separate parts ;—as in the case of an *homogeneous* sale, for instance, such as a sale of two *dirms* for two *dirms*, in which the unities on each side are opposed to those on the other respectively ; whence if each of the contracting parties respectively take *one dirm*, and they then separate from the meeting, the sale is valid to the amount seized ;—whereas, if the separate parts of the subject of the sale, instead of being opposed to each other in a *definite* manner, should be opposed to each other in an *indefinite* manner, the sale in the amount seized would not be lawful, since it must necessarily follow that the amount seized by each of the parties would stand opposed, indefinitely, to what *was* seized and what *was not* seized.—It is therefore evident that the opposition of a total to a total infers the opposition of the unities respectively ; and as this, to give validity to the contract in question, must be in a *definite* manner, it is *presumed* to be so, in order that the contract may be valid.—With respect to what *Ziffer* and *Shafēi* urge, that “ a modification is induced with regard to the requisites of the contract,” we reply, that a modification is induced with respect to the *quality* of the contract, but not with respect to the original requisites of it, because the original requisite of the contract is that a total shall be transferred in exchange for a total, and this continues unaltered.—Analagous to this is a case where a person sells the half of a slave, shared in an equal degree between him and another ; for in that case the law supposes the sale to apply to his *own* share, in order to its validity. The cases enumerated by *Ziffer* and *Shafēi*, on the contrary, are not analogous to this in question.—The *first* case (namely, that of a *Moorábibat* sale) is not analogous, as it is not possible to suppose that the whole of the profit is exacted on the

the *cloth*, for, if so, the sale of the bracelet would be rendered a sale of *friendship*, and hence an alteration would take place in the essence of the contract. The *second* case, also, is not analogous, because the mode there proposed for legalizing the sale is not determinate, since in the same manner as it is possible to construe the sum opposed to the slave to be one thousand *dirms*, so also is it possible to construe it to be *more* than one thousand, in every different gradation, until it amount to one thousand four hundred and ninety-nine *dirms*: in opposition to the case in question, where the mode proposed is *determinate*. The *third* instance, also, is not analogous, because the force of the sale there rests upon an indefinite object, which is incapable of being the subject of sale; and as *indefiniteness* and *specification* are of opposite import, it is impossible to construe the sale as applicable to any specific article. In the *last* instance, on the other hand, the sale is originally valid, and becomes otherwise from an accident, namely, the separation of the meeting: but the present question relates to a contract in its *original formation*, and not to any *adventitious* circumstances.

A SALE of eleven *dirms* in exchange for ten *dirms* and one *deenaar*, is valid:—and in this case ten *dirms* are considered as opposed to ten *dirms*, and the remaining *dirm* to the single *deenaar*; because in a sale of *dirms* for *dirms* equality is indispensable, and it is therefore reasonable to suppose that such was the intention of the parties; and with respect to the remaining part of the sale, namely, the opposition of one *dirm* to one *deenaar*, equality is not requisite, as they are not homogeneous.

and so also, where the article, on one side, consists of a certain number of coins of one species, and, on the other, of an equal number, of *two* species.

If, in a sale of gold for gold, or silver for silver, the subject, on one part, be inferior in point of weight to the other, and there be joined to the inferior something equal in value to the deficiency arising from the difference of weight, in this case the sale is valid, without being abominable. If, on the other hand, the value of the thing so added be not equal to the difference, still the sale is valid,

A deficiency of value, on one side, in point of *weight*, may be made up by the addition of any other article of proportionable value

but

but abominable. But if, on the contrary, the additional thing bear no value, (such as *dust*, for instance) the sale is not valid, because of its being usurious, inasmuch as nothing is opposed to the difference of the weight.

A *debt* may be commuted in the course of a *Sirf* sale.

IF a person, indebted to another to the amount of ten *dirms*, sell to his creditor one *deenar* for ten *dirms*, and having delivered the *deenar* to him, the parties then commute the ten *dirms* which they reciprocally owe to each other, it is lawful. This case, however, supposes the sale of the *deenar* to relate to ten *dirms* in an *absolute* manner, and not to the debt.

One *pure* and two *base dirms* may be sold for two *base* and one *pure*.

THE sale of one pure *dirm* and two base ones in exchange for two pure *dirms* and one base one, is lawful.—By a *base dirm* is to be understood, such as passes amongst merchants, but is rejected at the public treasury.—The reason of the legality, in this instance, is that an equality according to *weight* is established, and the quality of *purity* is of no account.

Description of, and rules respecting, base coinage.

DIRMS in which the *silver* is predominant are considered as silver, and *deenars* in which the *gold* is predominant are considered as gold; and a difference in the proportion with respect to them in a sale is consequently unlawful, in the same manner as in the case of pure *dirms* or *deenars*. Hence it is unlawful either to sell *base* money in exchange for *pure*, or *base* in exchange for *base*, unless upon a footing of equality in regard to weight.—In the same manner, also, it is unlawful to *borrow* base money except according to weight: for *dirms* and *deenars*, in common, are not free from a mixture of base metal; because gold and silver do not receive the impression well without a mixture of it, and it is sometimes *innate* in them.

IF, however, in *dirms* and *deenars*, the base metal predominate, they are not, in effect, *dirms* and *deenars*, because the law adverts to the

the predominancy. Hence if a person should purchase pure silver in exchange for *dirms* of that nature, the law is the same as has been already stated in the case of a sword with silver ornaments. It is lawful, moreover, to sell *dirms* and *decnars* of this nature in exchange for others of the same kind, at an unequal proportion; for as these consist of two different materials, (namely, *gold* and base metal, or *silver* and base metal,) one genus may therefore be opposed to another.—This, however, is nevertheless a *Sirf* sale, because of there being an opposition of gold or silver on each side; and hence mutual seizure in the meeting is necessary: and in the same manner as seizure of the *silver* or *gold* is necessary in the meeting, so also is that of the *base* metal, because a separation cannot be effected without detriment.—The compiler of the *Hedaya* observes that the modern lawyers of his country* do not pass decrees agreeably to this doctrine; for as base money is there much in use, it follows that if the sale of it at an unequal proportion were permitted, the door of usury would thereby be opened.

WITH respect to money in which the base metal predominates, it is to be remarked that, if it pass current by weight, purchase, sale, and loans are transacted in it by *weight*. If, on the other hand, it pass current by *tale*, all matters are transacted in it by *tale*.—If, however, *both* modes prevail, it is in that case permitted to follow either; for custom is decisive with respect to matters of this kind, provided they be not otherwise determined by the ordinances of the LAW.—It is also to be observed that money of this kind, whilst it continues in use, is a representative of price, and is therefore incapable of being rendered determinate: but if it should not be in use, it is considered as other wares or articles of merchandize, and is therefore capable of being rendered determinate.

* *Mawur al Nibr.*

IF *dirms* be adulterated to such a degree as to pass current with *some*, but not with *others*, they are equivalent to *Zeyf* or *base dirms*. Hence, if a person enter into a contract for something in exchange for a hundred specific *dirms* of this description, the contract does not relate to those specific *dirms* in particular, but to a similar amount of *base dirms*, provided the seller were aware of the circumstance;—but if otherwise, it relates to a similar number of pure *dirms*;—because in the *first* case the assent of the seller to receive the *base* species is established by his knowledge of the baseness,—whereas in the *second* case his assent is unestablished because of his *ignorance* of the baseness.

A sale for *base dirms* is null, if they lose their currency before the period of payment.

IF a person purchase wares in exchange for *base dirms*, and, previous to the payment of them, they should fall into general disuse, in that case the sale, according to *Haneefa*, is null. *Aboo Yoosaf* maintains that it is incumbent on the purchaser to pay the value which these *dirms* bore on the day of sale. *Mohammed*, on the other hand, alledges that it is incumbent on him to pay the value which they bore on the last day of their currency. The arguments of the two disciples are that the contract in itself is valid; but the delivery of the *dirms* becomes impracticable from the disuse of them; a circumstance, however, which does not induce invalidity;—any more than where a person purchases an article for *fresh dates*, and the season for those passes away;—in which case the sale is not invalid; and so also in the case in question.—As, therefore, the contract is not invalid, but still endures, it follows that, according to *Aboo Yoosaf*, the value the *dirms* bore at the time of the sale is due, because from that period responsibility for them takes place; in the same manner as in a case of usurpation;—and that, according to *Mohammed*, (on the other hand) the value they bore on the last day of their currency is due, since at that period the right of the seller shifted from *them* to their *value*.—The argument of *Haneefa* is, that the price is destroyed by the disuse; for money is the representative of price solely from custom, and from this property is annulled from disuse. The sale, therefore, remains without

without any *price* being involved in it, and is consequently null; and as the *sale* is null, it is of course incumbent on the purchaser to restore the goods to the seller, provided they be extant; or, if otherwise, the value which they bore on the day he obtained possession of them; in the same manner as in an *invalid sale*.

A SALE in exchange for *Faloos* is valid, because they are considered as durable property. If, therefore, the *Faloos* pass in currency, the sale is lawful, although they may not have been specified,—because *Faloos* are, from custom, representatives of price, and consequently stand not in need of specification. If, however, they should not pass in currency, it is in that case requisite that they be particularly specified, in the same manner as other articles of merchandize.

Rules with
respect to rep-
per coinage.

If a person purchase wares for *Faloos*, which at that time passed in currency, but which previous to the payment of them fall into disuse, the sale is in that case null, according to *Haneefa*: contrary, however, to the opinion of the two disciples.—The difference of opinion upon this point is analogous to what has been already mentioned in treating of *dirms* in which the alloy is predominant.

If a person borrow *Faloos*, and their currency should afterwards cease, then, according to *Haneefa*, the borrower must make repayment in similars*; because *Karz* [a loan of *money*] is equivalent to *Areeat* [a loan of *substance*,] and therefore requires the restoration of the actual article with respect to its *nature*, that is, its *value*.—The property of representing price, moreover, is merely an *adventitious* property, in copper coin, to which no regard is had in the borrowing of them; on the contrary, they are borrowed on the principle

* By *similars* is always understood any articles compensable by an equal number of the same description, such as *eggs* for *eggs*, *Faloos* for *Faloos*, &c. It is treated of at large in various other parts of the work.

of their being *similars*; and this quality they retain after the disuse of them as money, whence it is that a loan in them is valid after they have lost their currency.—According to the two disciples, on the contrary, the borrower must in this case pay to the lender the *value* of the *Faloos*; for their quality of representation of price being annulled by the disuse, it is therefore impracticable for the borrower to restore them with the qualities they possessed when he received them; and hence, as the payment of *similars* would be an injury, it is required that he pay the *value*; in the same manner as holds where a person borrows any articles of which the unities are similar, and the whole genus of which afterwards becomes extinct.—According to *Abou Roosaf*, their value must be fixed from the day of seizure; and according to *Mohammed*, from the last day of their currency, in conformity with what has been already explained. This difference of opinion originates in a difference of doctrine respecting a case where a person *usurps* an article of the class of similars, and of which the similars afterwards become extinct*, when, according to *Abou Roosaf*, the usurper is responsible for the value the article bore on the day of usurpation; and, according to *Mohammed*, for the value it bore on the last day of its existence.—It is to be observed that the opinion of *Mohammed* is founded upon tenderness to mankind, and that of *Abou Roosaf* on *convenience*.

It is lawful for a person to purchase any thing in exchange for a half *dirm* of *Faloos*†; and in this case he is required to pay the number of *Faloos* adequate to the price of half a *dirm*.—In the same manner, it is lawful to purchase any thing for the *Faloos* of a *dánik*‡ of

* Such as *fruits*, or other articles which are to be had only at particular seasons of the year.

† That is, For *Faloos* to the value of half a *dirm*.—(The distinction, in this instance, turns entirely upon the nature of the phrase in the original idiom.)

‡ A small silver coin, the sixth part of a *dirm*.

silver, or a *Kerát** of silver.—In all these cases, *Ziffer* is of opinion that the bargain is unlawful, because *Faloos* being an article of tale, estimated by number and not by their relation to *dirms* or *dániks*, a specification of the number ought therefore to have been made.—The reasoning of our doctors is, that the exact number of *Faloos* adequate to the price of a half *dirm*, or a *dánik*, is known, (for the case in question proceeds on the supposition of such a knowledge,) and that a specification of the number is therefore unnecessary.—If the purchaser were to say, “I have bought this thing for the *Faloos* of one “*dirm*, or two *dirms*,” the bargain in that case also is valid, according to *Abou Yoosaf*; for this expression means the number of *Faloos* to which the price of one or two *dirms* is adequate, and not the weight.—It is related as an opinion of *Mohammed*, that a sale for the *Faloos* of one *dirm* is not lawful; but that a sale for the *Faloos* of any thing under a *dirm* is lawful, as it is customary to purchase things for *Faloos*, where the value is not adequate to a *dirm*, but not otherwise. Lawyers have observed, that the opinion of *Abou Yoosaf* is the most approved, especially in countries where the practice of selling and purchasing for *Faloos* is common, and where, of course, the rate they bear, with respect to *dirms*, is known and ascertained.

If a person, having delivered a *dirm* to a *Sirraf*, or money changer, should say to him, “Give me *Faloos* in exchange for one half of this, “and a half *dirm* wanting one grain of silver in exchange for the “other half,” in this case the sale, according to the two disciples, is valid with respect to the one half in exchange for *Faloos*, and invalid with respect to the other; because the sale of a half *dirm* in exchange for *Faloos* is lawful (as has been already explained;) but the exchange of a half *dirm* in exchange for a half *dirm* wanting one grain of silver, is usurious, and consequently unlawful. Agreeably to the tenets of

* A *Carat*, the twenty-fourth part of an ounce.

Haneefa, the sale is in this case completely null, because the whole is comprehended under one contract, and the invalidity being strong, with respect to a *part*, does therefore communicate itself to the whole. If, however, the word "Give" be repeated, by the person saying, "Give me *Faloos* in exchange for *one* half, and give me a half *dirm* wanting one grain in exchange for the *other* half," the opinion of *Haneefa*, in such case, accords with that of the two disciples, because here exist two separate sales, one valid, and the other invalid. —If the purchaser, without opposing the halves of the *dirm*, were to say, "Give me, in exchange for this *dirm*, the *Faloos* of half a *dirm*, and a half *dirm* wanting one grain;" the sale is valid in full, because, in this case, it is construed to be an opposition, on the one hand, of one half *dirm* wanting a grain in exchange for one half *dirm* wanting a grain; and on the other, of a half *dirm* with the super-addition of a grain for the *Faloos* of a half *dirm*; and this is lawful.

H E D Â r A.

B O O K XVIII.

Of *Kafâlit*, or *Bail*.

KAFÂLIT literally means *junction*. In the language of the LAW it signifies the junction of one person to another in relation to a *claim*: (some have said, in relation to a *debt* only; but the first is the most approved definition.)—The person who renders obligatory on himself the claim of another, whether it relate to person or property, is termed the *Kafeel*, or surety:—the claim itself, in favour of which bail is given, whether it relate to the person or property, is termed *Makfool-be-bee*:—the claimant is termed *Makfool-le-boo*; and the principal, or person who gives bail, is termed *Makfool-an-boo*.—In cases of bail for the *person*, however, the terms *Makfool-be-bee* and *Makfool-an-boo* relate to the same thing.

Definition of
the terms used
in bail.

CHAP.

- Chap. I. Introductory.
- Chap. II. Of Bail in which two are concerned.
- Chap. III. Of Bail by *Freemen* in behalf of *Slaves*, and by *Slaves* in behalf of *Freemen*.
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C H A P. I.

Distinctions. **B**AIL is of two descriptions. I. *Bail for the person*, which is termed *Házir-Zámínee*. II. *Bail for property*, which is termed *Mál-Zámínee*.

Bail for the
person,

BAIL for the *person* is valid; and in virtue of it the surety is bound to produce the principal, or person whom he has bailed.—*Shaf'ee* is of opinion that bail for the person is not valid, because the surety undertakes and renders obligatory on himself a delivery which he is not capable of performing, inasmuch as he possesses no power or authority over the person of the principal: contrary to bail for *property*, as in that case the surety possessing power and authority over his own property is thereby enabled to discharge the obligation he has contracted.—The arguments of our doctors upon this point are twofold. **FIRST**, the prophet has said “*The surety is responsible*,” which is a proof that both modes of bail are lawful. **SECONDLY**, the surety is in a degree capable of delivering the person for whom he is bail, as he may inform the claimant of his place of abode, and thus remove the bar between them, since, after obtaining such knowledge, the claimant may demand the aid of the officers of the *Kazee*, by whose means he

may

may secure his presence. There is, moreover, a necessity amongst mankind for this kind of bail; and the characteristic of bail, namely, a junction of one person to another in relation to a claim, is observed in it.

BAIL for the person is contracted, where any one says; "I have become bail for the *person* of a particular man," or, "for his *neck*," or "for his *soul*," or "for his *body*," or "for his *head*," or "for his *face*;" because some of these words really mean, in their common acceptance, the *whole* of the person, and others bear that sense metaphorically, as has been already explained under the head of divorce.—The effect is also the same when a person says, "I have become bail for the *half* of a certain person," or "for a *third* of him," or "for a *part* of him;" because the person, in the case of bail, being incapable of division or dismemberment, the mention of a *part* indefinitely is therefore equivalent to the mention of the *whole*. It is otherwise where a person says "I have become bail for the *hand*," (or "the *foot*,") because neither of these parts are ever used to denote the whole of the person, and the bail so given is therefore invalid.

under what
forms con-
tracted.

If a person say "I am responsible [*Zámin*] for such a person," it is a valid bail; because this is an express declaration of the intention of bail. It is also a valid bail, if a person say, "This is *upon* me," or, "This is *towards* me," because both these expressions indicate an obligatory engagement.—In the same manner, also, bail is contracted by the words *Zeyim* and *Kábeel*, for both of these signify bail, and hence it is that bail-bonds and other instruments of obligation are termed *Kabála*. If, on the contrary, a person say, "I am responsible for the *notoriety* of a certain person," bail is not contracted, since the responsibility, in such case, relates merely to the *notoriety* and not to the *claim*. Hence if a person should say, in the Persian language, "His acquaintance is upon me," he does not thereby become bail.—If, however, he should say, "He is

“ my acquaintance,” lawyers are of opinion that he becomes bail because of ancient custom.

The surety must deliver up the person for whom he is bail at the stipulated period; and in failure of this, is liable to imprisonment.

IF, in a contract of bail, it be stipulated that “ the surety shall, at “ a fixed period, deliver over the principal or person bailed to the “ claimant,” it is in that case necessary that he be delivered to the claimant, if it be required, either at the fixed period, or at any time afterwards, in order that the surety may acquit himself of the engagement into which he has entered.—If, therefore, he deliver the person bailed on the demand of the claimant, he then becomes released from his engagement; but if he refuse to deliver him, the magistrate must in that case imprison him for failure in the performance of his engagement. He is not, however, to be imprisoned on the *first* summons, as he may not then know for what reason the *Kázee* had summoned him.

If the principal disappear, the surety must be indulged with time to search for him; and the contract is fulfilled by delivering up the principal at any place which admits of litigation.

IF, in a case of bail for the person, the principal should disappear, it is in that case incumbent on the *Kázee* to afford the surety a sufficient period to go and come in search of him; and afterwards to imprison him, in case of his not producing the principal, because he is then proved to have failed in his engagement.—If, however, he produce the principal, and deliver him to the claimant, in such a place as may enable him to litigate his suit with him, the surety is then released from his engagement of bail, because of his performance of the obligation he had contracted; and the end of the contract is likewise answered, as it only requires that he deliver him *once*. If he should have agreed to deliver him “ in the assembly of the *Kázee*,” and afterwards deliver him in the market place, still he is released from his engagement, because the object of the bail is answered. (Many have observed that in the present age the surety would not in such case be released from his obligation; because, as the probability in this age is that the people would aid the defendant in preventing his appearance in the assembly of the *Kázee*, and that they would not assist the

the claimant in enforcing it, such a clause is therefore beneficial.)
 —If, however, the surety deliver over the principal in a *desert*, he is not released from his engagement, because the claimant could not in such place litigate his suit with him, and the object of bail remains therefore unaccomplished. In the same manner, he is not released from his obligation in case he deliver him up in a village where there is no *Kázee*; because, where there is no *Kázee*, the claimant can obtain no decree. If he should deliver him up in another city than that in which he had entered into the contract of bail, he is then (according to *Haneefa*) exempted from any further obligation.—The two disciples are of a different opinion, because it may often happen that the witnesses are in the city in which the contract was formed. —If, moreover, he deliver over the principal in the prison, where he had been previously confined by another for a different cause, he is not released from his engagement, because the claimant has no power, in such situation, to litigate his suit with him.

If, in a case of bail for the person, the principal should die, the surety is then released from his engagement; *first*, because of the impracticability of producing the person; and, *secondly*, because, in the same manner as the appearance of the principal is by such event defeated, so also is the enforcement of it on the part of the surety. The same rule also holds in case of the death of the surety; because it then becomes impracticable for him to deliver up his principal; and, also, because his property is not of an analogous nature, so as to admit a discharge of the obligation by means of it.—It is otherwise in the case of bail for *property*; for if the surety for property die, the obligation of bail does not then cease, since it is necessary to discharge it by means of his property, to whatever amount he may have rendered himself liable.

The death of the principal releases the surety;

and the death of the surety annuls the contract.

If the claimant should die, his executor (if there be any) or otherwise his heirs, are entitled to claim the fulfilment

If the claimant die, the heirs or executors

may demand the fulfilment. from the surety; because heirs and executors represent the dead.

The surety is released by delivering up his suretee;

or, by delivering him-
self up;

or, by his being delivered up by a messenger.

IF, in a case of bail for the person, the surety should not stipulate his release from the bail on the delivery of the person, he is nevertheless released on such delivery, because this being the intention of the contract, it is consequently established independant of an express declaration. It is to be observed, likewise, that the surety becomes exempt from his obligation on the delivery of the person, without the acceptance of the claimant being required as a condition, in the same manner as in the payment of a debt. The effect is also the same, in case the principal should of himself present his person, as if he should say "I have presented myself on account of the bail of a particular person who has become surety for me." This is approved, because the surety being entitled to contend with him, in order that he may deliver himself up, it is therefore permitted to him to deliver himself up voluntarily to prevent contention. It is also lawful for the agent or messenger of the surety to deliver the person, as these are the representatives of the surety himself.

The payment of the claim may be suspended upon the non-production of the principal:

but still the bail for the person remains in force.

IF a person become bail for the appearance of another, on this condition, that, if he do not deliver him within a particular period, he shall then be responsible for the claim upon him, (a thousand *dirms* for instance,) and he afterwards fail of producing him within the fixed period, he is then bound to make good the claim upon the suretee;—because in this case a bail for *property* is suspended on the condition, namely, the failure in producing the person within a fixed period; and such suspension is valid, because of the custom of mankind. Hence, when the condition is not fulfilled, the surety becomes responsible for the claim; and he is not, nevertheless, released from the bail for the person; because bail for the person and bail for the property are not incompatible.—*Shafe'i* maintains that the bail in this instance is not valid; because bail for property induces a responsibility for property in the

the same manner as sale; and hence it is unlawful to suspend it on a matter of doubt and uncertainty; in the same manner as in the case of sale.—The reasoning of our doctors is that bail for property is ultimately like *sale*, inasmuch as it entitles the surety to repayment *from* the principal of what he advanced to the claimant on his account,—and that in the beginning it resembles a gift, being an acquiescence in responsibility without any exchange.—In due observance, therefore, of both these circumstances, it is declared that the suspension of it, on an uncertain condition, (such as the blowing of the wind, the falling of the rain, and the like,) is invalid; but that it is valid if suspended on a certain condition, such as in the case in question.

If a person be bail for the appearance of another “on the morrow,” under a condition of answering the claim upon the other himself, in case of failure, and the principal die before the morrow, he is in that case surety for the property, because here the condition on which he agreed to the responsibility clearly takes place.

If the time be fixed, and the surety die in the interim, the surety becomes responsible.

If a person claim one hundred *deenars* from another, either with or without an explanation of their quality, and a third person become bail for the person of the debtor, under a condition that “if he do not deliver him on the morrow, he shall be responsible for an hundred *deenars*,” and he fail in the delivery of him on the next day, he is in that case responsible, according to *Haneefa* and *Abou Yoosaf*, for the one hundred *deenars*.—*Mohammed* maintains that if the *quality* of the *deenars* be not explained previous to the acceptance of the bail, the claimant has no right afterwards to explain their quality and demand them from the surety.—His arguments in support of this opinion are twofold. FIRST, the surety has rested indefinite money upon a matter of doubt and uncertainty, inasmuch as he has not specifically referred the one hundred *deenars* to those which were claimed; (for which reason the bail is invalid, even if a definition of the quality have been previously given.)—SECONDLY, the claim of an hundred *deenars*, without

Case of bail for property, connected with bail for the person.

without a definition of their quality, is invalid; whence no obligation lies on the surety to produce the debtor; and as, where the production of the debtor is not obligatory on the surety, the bail for the person is of consequence invalid, it follows that the bail for the property is also invalid, since this rests upon the other.—(From what is here advanced it appears that the bail in question is valid if the *quality* of the *deenars* be specified.)—The argument of the two elders is that the *deenars* mentioned by the surety do evidently, from the circumstances of the case, relate to those claimed.—It is, moreover, a frequent practice to keep a claim in a state of doubt and uncertainty.—The claim in question, therefore, is valid, in this way, that the claimant will (it is to be expected) explain the quality, and such explanation will be applied to the original claim:—and upon the *claim* becoming valid, the *first* bail (namely bail for the person) becomes valid; and in consequence thereof the *second* bail (namely bail for the property) also becomes valid.

Bail for the person cannot be exacted in cases of punishment or retaliation:

but may be taken if offered by the accused.

BAIL for the person is not lawful in cases of punishment and retaliation, according to *Haneefa*;—that is, the *Kázee* has no power to exact it by compulsion.—If, however, the person upon whom punishment or retaliation is claimed, should in a voluntary manner give bail of himself, it is admissible in the opinion of all our doctors; because that which is the end of bail for the person is in this case also answered, since the production of the person of the accused is hereby secured.—It is to be observed that the person upon whom punishment or retaliation is claimed, must not be imprisoned until evidence be given, either by two people of unknown character, (that is, of whom it is not known whether they be just or unjust) or by one just man who is known to the *Kázee*; because the imprisonment, in this case, is founded on suspicion, and suspicion cannot be confirmed but by the evidence of two men of unknown character, or of one just man. It is otherwise in imprisonment on account of *property*; because the defendant, in that instance, cannot be imprisoned but

but upon the evidence of *two just men*; for imprisonment on such an account is a grievous oppression, and therefore requires to be grounded on complete proof.—In the *Mabsoot*, under the head of *duties of the Kázee*, it is mentioned that, according to the two disciples, the defendant, in a case of punishment for slander, or of retaliation, is not to be imprisoned on the evidence of *one* just man, because, as the exaction of bail is in such case (in their opinion) lawful, bail is therefore to be taken from him.

It is lawful to take a pledge or accept of bail for the payment of any fixed tribute, because tribute being a debt of which the payment is demanded, it may be discharged by means of the pledge or the bail, and hence the objects of these contracts is answered.

A pledge or bail may be accepted for the payment of any fixed tribute.

If bail for the person be first taken from one, and afterwards from another, the bail in that case holds with respect to both; for the design of bail is to fix the obligation of a claim, and this may be extended to many, so as to render them severally responsible. Besides, as the object of bail is security, this is increased by the taking of bail from another; and hence there is no incongruity in the existence of both at the same time.

ALL that has been here advanced relates to bail for the *person*.—With respect to bail for *property*, it is lawful, whether the extent of the property be known or uncertain, provided it be founded on a just debt,—that is, a debt which cannot be annulled but by payment or exemption: in opposition to a claim of *ransom*, which is a debt due by a *Mokátib* to his master,—because that may possibly become null without payment or exemption, by an inability in the *Mokátib* to discharge it. Property known in the extent is (for instance) where a person says to a claimant “I have become bail for a person who owes you a thousand new *dirms*.” The nature of *uncertain* property may also be explained by an example; as for instance, where a person says “I have
“ become

Bail for property is lawful, if founded upon a just debt, whether the extent be known or uncertain.

“ become bail for the debt which a particular person owes to you ;” or, “ I have become bail in this sale for whatever claim may hereafter be made on the subject of it,”—which bail is termed *Kafalit-be'l-dirik*, or bail for accidents, that is, *for whatever may happen*. In short, bail for certain or uncertain property is lawful, because bail rests upon a broad foundation, and a small degree of uncertainty in it is therefore of no consequence. Besides, all our doctors are agreed in the legality of *Kafalit-be'l-dirik*, or bail for *what may happen*; which is a convincing argument of the legality of bail for *uncertain* property. Moreover, bail is lawful in the case of unintentional *Shoodja* [a wound occasioned by the throwing of a stone] although there be in it a great degree of uncertainty; because it is possible that death may ensue, which induces retaliation; and it is also possible that a recovery may take place, in which case a *fine of property* only is required. Now if, notwithstanding this degree of uncertainty, the bail be lawful, it follows that it is in the same manner lawful in the case of *uncertain property*.

In a case of bail, the claimant is at liberty to make his demand either from the *surety* or the *principal*;

THE person to whom the bail is given is at liberty to demand payment either from his debtor, who is the principal, or from his surety, because bail signifies a junction of personal responsibility to the personal responsibility of the debtor, in a claim; and this does not imply an exemption to the debtor from the claim; on the contrary, it marks the continuance of his responsibility;—unless such exemption should have been specified as a condition in the contract of bail, in which case the contract of bail becomes a contract of transfer, in the same manner as a transfer becomes bail, if a condition of exemption to the debtor be not specified; because regard must be had to the *spirit* of the contract; and in the former instance the contract bears the sense of a transfer, in the same manner as, in the latter, it bears the sense of *bail*.

and may call

If the person to whom the bail is given call upon one of the two parties,

parties,—that is, upon either the debtor or the surety,—he is entitled also to call upon the other; and he may, if he please, call upon *both*.—upon either or both. It is otherwise where the proprietor demands compensation for his property from one of two usurpers,—(that is, from the original usurper, or from another who has usurped it again from him;) for he cannot then demand it from the other; because upon his agreeing to accept compensation for the usurped property from *one* of them, he thereby constitutes him proprietor, since option of compensation involves investiture with right of property; and hence the impossibility of his afterwards constituting the other proprietor. A claim in virtue of *bail*, on the contrary, does not involve an investiture with right of property.—There is therefore a difference between these cases.

THE suspension of bail upon a condition is lawful.—Thus if a person say to another “If you sell your goods to *Zeyd*, the price is “upon me,”—or, “If any thing be due to you from a certain person, that is upon me,”—or, “if a certain article be usurped from “you, the damage is upon me,”—in all these cases the bail is lawful, because all our doctors have agreed upon the legality of *Kafalit-be'l-dirik*, when suspended on a condition.—It is to be observed, however, that although conditional bail be lawful, still it is requisite that the condition on which it is suspended be of a nature adapted to the contract of bail,—either by resting upon the obligation of a right, (as if the surety should say, “If the subject of the sale be not claimed by “another, I hold myself responsible for the price,”)—or, by resting upon the *possibility* of the exaction of a debt, (as if he were to say, “upon *Zeyd* [meaning the *principal*] arriving,” &c.) or, by resting upon the *impossibility* of the exaction of a debt, (as if he were to say, “upon such a person [meaning the *principal*] disappearing,” &c.) for the suspension upon a condition *not* of a fit nature,—(such as, upon the falling of rain, or the blowing of wind,) is unlawful.—In the same manner also, it is unlawful to stipulate these events as the period for payment of debt;—as if a person should say, “I have become bail for
 Vol. II. 4 E “ the

Bail may be suspended upon any fit and proper condition.

“ the debt due to you by a certain person, *until the rain fall, or the wind blow,*” in which case the bail is valid, but the condition is invalid, and therefore an immediate payment of the money is required; because the suspension of bail on a condition is valid, and it does not become invalid from the invalidity of the condition, being similar to the case of divorce and emancipation.

Where the bail is given in an *unlimited* manner, the amount is ascertained by testimony, or, that failing, by the declaration of the surety.

If the surety say to the claimant “ I am bail for the debt due to you by a particular person,” and it be afterwards proved, by witnesses, that the debt amounts to one thousand *dinars*, in that case the surety is answerable for that sum, because proof by *testimony* is equivalent to that by *actual sight*. But if the amount of the debt should not be proved by witnesses, the averment of the surety is in that case to be credited in the amount which he may acknowledge; for, with respect to whatever sum may be alleged beyond his own acknowledgment, he is considered as the *defendant*.—Hence if the principal acknowledge a greater amount than that acknowledged by the surety, it cannot be admitted to operate against him; because, considered as an acknowledgment or declaration with regard to another, it is invalid, as an acknowledger has no power over another.—It must be credited, however, with relation to himself; for he has power over his own person.

Bail may be contracted *with or without* the consent of the principal.

It is lawful to become bail either with or without the desire of the principal; because the tradition with respect to it is absolute, and does not restrict it to the desire of the principal. Bail, moreover, being an obligatory engagement, is a deed relative to the surety himself, in which there is an advantage to the claimant and no detriment to the principal: for if he should have become bail *without* the desire of the principal, then he has no right to apply to him for what he may pay on his account; or if, on the other hand, the bail was contracted by his desire, then the principal has expressed his acquiescence in his claim of repayment from him, to which he is entitled because of his having

having made the payment in virtue of authority from him,—whereas he has no right to repayment in case of having become bail without the desire of the principal, as the payment so made was a gratuitous deed.—It is to be observed that the surety has a right to a repayment, from the principal, of the sum which he may have advanced on his account in virtue of the responsibility he contracted by his desire.—As for instance, if the debt be one thousand good *dirms*, and he pay the claimant one thousand good *dirms*, he is then entitled to the repayment of one thousand good *dirms*.—But if he should make a payment of a nature different from his engagement,—as if, having become bail for one thousand good *dirms*, he should pay the claimant one thousand *bad*, or *vice versa*,—he is in that case intitled to receive from the principal the full amount for which, by his desire, he had become responsible; because the surety, from the payment of the debt, becomes proprietor of it, and stands therefore in the place of the creditor;—in the same manner as if he had become proprietor of it by virtue of a gift, or of inheritance;—(that is, as if the claimant had bestowed on him a gift of the debt due to him by the principal, and permitted him to take possession of it,—or, as if the surety had succeeded to the debt in right of heritage;—or, in the same manner as where the person to whom a debt has been transferred acquires a property in the debt by either of these modes.)—It is otherwise in the case of a person instructed to pay a debt; for if a person be desired by another to pay a debt on his account, and pay it accordingly, he is in that case entitled to receive from the other the exact sum he has paid on his account, although the debt relate to *bad dirms*, and he pay it in *good*; because a person so instructed, having incurred no responsibility, has therefore no right to become proprietor of the debt in virtue of his having paid it.—It is otherwise, also, if a person, having become bail for a debt of one thousand *dirms*, should compound with the claimant for the payment of five hundred *dirms*;—for in this case he is intitled to receive only five hundred *dirms* from the debtor, because composition is similar to annulment of part of the debt, and the case is therefore the same as if the

Circumstances under which a surety has or has not a right to demand compensation from his principal.

claimant had remitted part of the debt to the surety; and as, in case of remission of the debt by the claimant, the surety has no right to receive any thing from the debtor,—it follows that, in the case of *composition* also, he has no right to receive more than he has actually paid.

He cannot claim reimbursement until he has actually discharged the claim upon the principal:

A SURETY has no right to advance any claim on the principal until he make payment on his account, because he does not become proprietor of the debt until he pays it.—It is otherwise with respect to an *agent for purchase*; as he is entitled to receive from his constituent the price of the merchandize previous to the payment of it on his part. The reason of this is that there virtually subsists a contract of exchange between the constituent and his agent; because the right of property is first established in the agent, and afterwards shifts to the constituent;—and hence they stand to each other in the relation of buyer and seller;—whence it is permitted to the agent to detain the merchandize from his constituent until he receive the price from him.

but he may proceed as the claimant proceeds.

IF the claimant importune the surety in pursuit of his claim, then the surety may in the same manner importune the principal or suretee. If, also, the surety be imprisoned by the claimant, he is in the same manner entitled to imprison the principal.

He is released by discharge to the principal; but the principal is not released by an exemption. to him;

IF the claimant remit the debt to the suretee, or receive payment of it from him, the surety is in that case released from his engagement, because the debt, in reality, is due by the suretee:—but if he exempt the *surety*, the suretee (or *principal*) does not thereby become exempted from his debt; because the surety is merely a *dependant*; and, also, because he is liable only to a *claim*, whereas the debt exists in the principal independent of such claim.

and the same of a *suspension* of the claim.

IF the claimant allow the principal a respite from his claim, or suspend his claim upon him to a more distant period, such respite or suspension

suspension of claim operates also in favour of the surety;—but if he grant a respite of his claim to the surety, it does not operate in favour of the principal;—because respite or suspension, as being a *temporary* remission, is therefore analogous to an *absolute* remission.—It is otherwise where, the debt being immediately due, the creditor accepts bail for the payment at the period of a month afterwards; for this suspension of his claim for a month operates also in favour of the principal, because here the period of suspension agreed upon is a circumstance annexed to the debt, which, at the time of contracting the bail, was immediately due.

If a surety, in a debt of one thousand *dirms*, compound with the creditor for a payment of five hundred *dirms*, in that case both the principal and the surety become exempted from their respective obligations for the remaining five hundred *dirms*;—because the surety having referred the composition to the thousand *dirms* due by the principal, the principal becomes thereby released from his obligation by the payment of five hundred *dirms*; for composition is a cancelling of part of the debt;—and the release of the debtor from his obligation occasions the release of the surety.—He is also in this case entitled to five hundred *dirms* from the surety, provided he entered into the bail with his consent.—It were otherwise if the surety should compound the debt for some thing of a different species, (as if, instead of the *dirms*, he should agree to pay a particular number of *deenars*; or any article of merchandize;) for in such case he is entitled to a full payment of the debt, since such composition is in the nature of a contract of exchange, and the surety becomes proprietor of the debt in virtue of his having given a consideration for it.

A surety, *compounding* the debt of the principal with the claimant, discharges both from any further demands;

and has a claim upon the surety for what he pays in composition.

If the surety compound with the creditor for an exemption from the obligation contracted by him in virtue of the bail, the principal is not thereby exempted, because the said composition is merely an exemption

A surety *compounding* for an exemption on his own behalf does

not discharge
the principal.

emption granted to the surety from a claim upon him.—Thus, for instance, if the surety for one thousand *dirms* compound with the creditor for one hundred *dirms*,—in other words, if the creditor agree that, on condition of his paying one hundred *dirms*, he will exempt him from the rest of his obligation,—in that case he becomes exempted from responsibility; and, provided he had become bail by desire of the principal, he is entitled to receive one hundred *dirms* from him, whilst the creditor retains his claim on the principal for the remaining nine hundred *dirms*.

Cases in which
the surety's
right against
the principal
depends upon
the terms of
his exemp-
tion or dis-
charge.

IF a claimant say to the surety, who had become bail by desire of the principal, “You are enlarged from the claim towards me,” in that case the surety is entitled to receive the amount in question from the principal; because, according to the rules of grammar, this sentence, in which the preposition *from* with respect to the object, and that of *towards* with respect to the claimant of such object, are used, means that the claim has been discharged.—Hence the claimant, in this case, is held to have made an acknowledgment of the discharge of the claim; and for this reason the surety is entitled to receive the payment of it from the principal.—But if he should merely say “I have enlarged you,” the surety is not entitled to any thing from the principal; because his enlargement, being here expressed without any mention made of its operation towards another, is considered as an *annulment*, and not as a *declaration of discharge*.—If he should only say “you are enlarged,” without adding, “towards me,” in that case there is a disagreement amongst our doctors.—*Mohammed* alleges that it is similar to the second instance—“I have enlarged you.” *Abou Yoosaf*, on the other hand, is of opinion that it is similar to the first instance,—“You are enlarged from the claim towards me.”—Some, again, have said that, in all these cases, if the claimant be present, it is requisite to demand an explanation from him, since he has used a dubious expression.

THE

THE suspension of enlargement from bail on a condition is not lawful; because an enlargement of this kind, as well as that of other descriptions, involves an endowment with right of property, and the *suspension* of an endowment with right of property is not lawful*.—There is a tradition that such suspension is lawful; because, in fact, a surety is responsible for a *claim*, and not for a *debt*,—whence such enlargement is, like divorce, a mere annulment†, and therefore cannot be undone by the rejection of the surety§:—and the enlargement from bail being a mere *annulment*, it follows that the suspension of it upon a condition is lawful, in the same manner as the suspension of *divorce* or *emancipation*: in opposition to the enlargement of the *principal*; as that is an endowment with right of property, and may therefore be rejected by him.

An enlargement from bail cannot be suspended upon a condition.

BAIL is not valid with respect to any *right* of which the fulfilment is impracticable by means of bail, as in cases of *punishment* or *retaliation*,—because proxies are not admitted in case of corporal punishment. But bail for the *persons* of criminals under the sentence of such punishments is lawful.

Bail, in cases of punishment or retaliation, is valid only for the *person*.

* An endowment with a right of property (such as a *gift*, for instance) must operate immediately, otherwise it is not valid.

† This doctrine is founded on the metaphysical distinction which the *Mussulmans* draw betwixt a debt and a claim. Thus where a person remits to another a debt contracted by *borrowing*, *purchase*, or the like, he, as it were, conveys or makes over so much property to that other:—but where he remits an obligatory claim upon another to answer the debt of a third person, he then merely annuls a right of his own; for as that other had not in reality received any property from him, he cannot by such remission be said to have made over so much property to him.

§ A gift, or any deed vesting property in another, cannot operate without the consent of that other. On this principle a gift is not held to take place until the seizin of the donee, as, until then, it is in his power to render it void by a rejection. But it is not in the power of the surety to prevent the operation of the exemption in his favour by the rejection of it, as it is held to be an annulment of a right on the part of the claimant, and not a deed conveying property to him.

Bail may be given for the price, but not for the goods, in a sale.

A PERSON may lawfully become bail, on the part of a purchaser, for the payment of the price, because price is a debt: but it is not lawful to become bail, on the part of the seller, for the merchandize; for that is substance, of which the compensation, in case of destruction, is insured, by means of something of a different kind, namely, the *price*; and although bail for insured substance be lawful in the opinion of all our doctors, still it is required that the substance be insured for a similar in kind, such as the subject of an invalid sale, an article seized in virtue of an intention to purchase, or an article usurped; but not for any substance which is insured for something of a *different* kind, such as the subject of a *valid* sale, or a *pawn*; nor for any substance held in the nature of trust, such as a deposit, a subject of rent, a loan, *Moudaribat* stock, or *partnership* stock.—If, after the purchaser, in a case of sale, had paid the price, a person become bail for the delivery of the goods to him,—or if, in a case of pawning, a person become bail for the pawnee's restitution of the pledge,—or, in a case of hire, for the renter's restoring the article hired,—in all these cases the bail is valid, because of the surety having engaged for the performance of what was due and incumbent.

Bail for the performance of work by a specific animal is not valid.

If a person hire a quadruped for the carriage of a burthen, and another be bail for the animal carrying the said burthen, it is not valid, because of the animal being the property of another.—This, however, proceeds on a supposition of the hire having related to a specific animal;—for, if the animal be not specific, the bail is valid, as in that case it is in the power of the surety to supply an animal of his own for the carriage of the burthen. In the same manner, in case of a person hiring a slave for service, bail given for his performance of the service is invalid, as the slave is not the property of the surety, and he has consequently no power of enforcing what he has undertaken.

A contract of bail must be formed with

A CONTRACT of bail is not valid unless it be formed with the consent of the claimant.—This is according to *Haneefa* and *Mohammed*.

Abou

—*Abou Yoosaf* alleges that a contract of bail is valid, if, having been formed without the knowledge of the claimant, it receive his assent on its being notified to him: and (according to several copies of the *Mabsoot*) his assent is not a condition.—This disagreement relates equally to bail for the *person*, and bail for *property*.—The reasoning of *Abou Yoosaf*, in support of his opinion, is, that as bail signifies an obligatory engagement, it is therefore binding on the person who undertakes it; and hence it would appear that it does not depend on the assent of the claimant: but the reason for suspending it upon his concurrence is the same as occurs under the head of *marriage*, treating of *Fazoolie* marriages; “ The declaration of the surety that he has become bail for a particular thing, on the part of a particular person, renders the contract complete; but as it is a deed affecting the claimant, (inasmuch as it invests him with a right to a claim,) it is therefore suspended upon his assent.”—The reasoning of the other two doctors is that bail creates a right; in other words, the surety constitutes the claimant proprietor of a claim upon him, which he accordingly demands from him after the completion of the contract.—Hence it follows that two points are necessary to the completion of the contract, namely, the speech of the surety, (which is equivalent to a declaration with respect to the claimant,)—and the speech of the claimant, (which is equivalent to acceptance.)—Now in the case in question there exists only *one* of these two requisites: the contract, therefore, is not suspended beyond the meeting; and consequently a contract of bail is not valid but through the consent of the claimant at the meeting:—excepting only in one instance,—namely, where a sick * person says to his heir, “ be you bail for whatever debts I may owe,” and the heir becomes bail accordingly in the absence of the creditors; for in this case the bail is effectual, notwithstanding the absence of the creditors, upon a favourable construction,—for two reasons; FIRST, the bail so contracted is, in effect, a *will*, and is therefore

the consent of the claimant,

except where the debtor is dying.

* Arab. *Martez*.—Always meaning a person sick of a mortal illness.

valid without the intervention of the claimant;—(and hence lawyers have remarked that this species of bail is not lawful unless when the sick person is in possession of property; because a *will* would not otherwise be lawful;) **SECONDLY**, the sick person is the representative of his creditors, because he stands in need of being so, in order that he may divest himself of his obligations; and also, because this is attended with an advantage to the creditors.—The case is therefore the same as if creditors had themselves been present.

OBJECTION.—If the sick person represent his creditors, it follows that *his* acquiescence is a necessary condition, in the same manner as that of the *creditors*, had they been present; and that the expression of “Be you bail on my part for whatever I owe,” is not conclusive of the contract;—whereas this renders it conclusive.

REPLY.—The bail founded on this speech of the sick person is valid, and his acquiescence is not required as a condition; because the meaning to be deduced from the speech is, evidently, a *desire* on the part of the sick man that the bail be concluded, and not merely a *consultation* respecting it; and his speech therefore resembles an order for the conclusion of a marriage, as already explained under the head of marriage.—(It is to be observed that if the speech of the sick person be addressed to a *stranger*, there is in that case a disagreement with respect to the validity of the bail.)

Case of bail gratuitously entered into on behalf of an insolvent defunct.

If a debtor die without leaving any property, and another becomes bail to his creditors, such bail is not valid, according to *Hanesfa*.—The two disciples allege that it is valid; because it is undertaken on account of a debt, established as the right of the creditors, and which is still extant, since no person has discharged it, whence it still exists so far as relates to the laws of futurity; that is to say, the debtor, if it be not discharged, becomes a criminal before God Almighty.—As, also, if the surety were actually to *discharge* the debt, such discharge would be valid, being a gratuitous act of justice, in the same manner *bail* for it is consequently valid.—The argument of *Hanesfa* in support

port of his opinion is, that the bail is in this case given for a debt which is annulled with relation to the laws of this world; and the validity of bail being founded on the laws of this world, it cannot be legally given for what no longer legally exists.

If a person, by desire of another, should become his bail for one thousand *dirms* which he owes, and the debtor give the surety one thousand *dirms* by way of *payment*, prior to his [the surety's] having paid the creditor, he [the debtor] is not in that case permitted to take from the surety the money he has advanced to him, for two reasons. **FIRST**, the right of the possessor (namely, the surety) is connected with the one thousand *dirms* on the probability of his having occasion to pay them to the creditor, and therefore whilst such probability exists the principal surety has no right to take them from him; similar to a case where a person hastily (that is, before the stated time) pays *Zakât* to the collector, in which case he would not be entitled to take it back from him. **SECONDLY**, the surety becomes proprietor of the said sum in virtue of the seizure, on a principle which shall be presently explained.—It is otherwise where the debtor gives the sum to the surety by way of *commission*; (as if he were to say to him, “Take this sum “and deliver it to the debtor;”) because the surety does not become proprietor in virtue of such a seizure: on the contrary, he is in such case merely a *trustee*.—It is to be observed that where the surety thus receives the thousand *dirms*, and becomes proprietor in virtue of such receipt, he is not required to devote in charity whatever profit he may acquire from it*; because in this instance the property vests in him immediately on the receipt. Where he receives it *after* having himself paid the debt, the reason of the property then vesting in him is evident; and where he receives it *before* he has paid the debt, he

A debtor paying his surety the sum for which bail has been given, before the surety has satisfied the creditor, cannot reclaim it.

* That is to say, whatever profit may arise from it between the period of his receiving it, and that of gratifying the claimant.

becomes proprietor immediately on the receipt.—The reason of this is, that the surety has a claim on the debtor for an article similar to that for which the creditor has a claim upon him: but the claim of the surety upon the debtor is suspended until he pay the debt to the creditor.—The claim of the surety, therefore, is in the nature of a debt to become due *hereafter*; (whence it is that if the surety should, previous to his having discharged the debt to the creditor, *exempt* the debtor from the claim he had upon him, such exemption would be valid.)—Now as an article similar to that for which the surety is responsible to the creditor is due to him by the debtor, it follows that on his receiving payment from the debtor he becomes proprietor in virtue of such receipt.—The degree of *baseness*, moreover, which obtains in such a transaction, (as shall be hereafter set forth) does not take effect, where a right of property exists, with respect to indefinite things; as has been already explained in treating of *invalid* sales.

Case of a delivery of substance by the principal, to guard his surety against loss.

IF bail be given for a *Koor* of wheat, and the principal deliver a *Koor* of wheat to the surety, and he sell and acquire profit by the same, in that case the profit so acquired is, in the eye of the LAW, the right of the surety, on the principle already explained, of the property having vested in him in virtue of the receipt.—The author of this work observes, that in his opinion it is most laudable that the surety give the said profit to the debtor, although, in the eye of the law, this be not incumbent upon him: and such (according to one passage in the *Jama Sagbeer*) is the opinion of *Haneefa* upon this point.—The two disciples maintain that as such profit is the right of the surety, he ought not therefore to give it to the debtor:—and this also is related as an opinion of *Haneefa*, as well as another, namely, that the surety ought to bestow it in *charity*.—The argument of the two disciples is that the profit, as having resulted from the property of the surety, becomes of consequence his right.—*Haneefa*, on the other hand, argues that, notwithstanding the existence of the property, there is still a degree

of baseness in it, because it was in the power of the debtor to retake the *Koor* of wheat from the surety, and deliver it himself to the creditor; or, because, in delivering it to the surety, it is probable that he did it with a view that he should deliver it to the creditor. Now the baseness here operates in consequence of the thing to which it relates being *definite*; and the mode of purging such baseness is (according to one tradition) by devoting the profit in charity, or (according to another) by giving it to the debtor, as the baseness is occasioned by *his* right, and not by the right of the LAW.—This latter is the most authentic doctrine; but it prescribes only a *laudable*, and not an *incumbent* duty; for the right of the surety is clear.

If a person become bail, by desire of the principal, for a debt of one thousand *dirms*, and the principal afterwards desire him first to purchase on his account silks to the value of one thousand five hundred *dirms*, in the manner of an *aynit*, and then to resell the same, and discharge the debt by means of the price, and the surety act accordingly, the purchase so made is considered as on *his own* account, *not* on account of the principal, and he must, of consequence, sustain the loss arising from the *aynit* sale.—An *aynit sale* is where a merchant, for instance, having been solicited by a person for a loan of money, refuses the same, but offers to sell goods to the other on credit at an advanced price; as if he should charge fifteen *dirms* for what is worth only ten, and the other person agree to the same. This is termed an *aynit* or *substantial* sale, because it is a recession from a *loan* to a specific *substance*; (in other words, the merchant declines granting the loan required of him by the borrower, but agrees, in lieu thereof, to sell him the cloth, which is a specific *substance*;)—and it is abominable, as being a recession from a loan of money, which is a laudable action, on a principle of avarice, which is a sordid quality.—With respect to the nature of the case in question, our doctors have disagreed.—Some have asserted, that the direction given by the principal to the surety infers his [the principals] being responsible for any loss that may

Case of bail
discharged by
an *aynit* sale.

may be sustained by the purchaser in consequence of the *aynit* sale, and that his direction in this particular is not a commission of agency; for this reason, that the order of the principal ("purchase silks on my account,") implies this assumption of responsibility:—but a responsibility of this nature is invalid, since responsibility cannot hold except in an article in which the person who is responsible has some interest; and no person has any interest in the *lofs* on the present occasion. Others again say, that the direction in question amounts to a commission of agency: but that it is an *invalid* commission, as the silks to which it relates are not definite, neither is the *price* of them definite from an ignorance of how much it may exceed the amount of the debt.—The purchase of the silks is, in fact, considered as having been made on account of the surety, and the loss resulting from it falls entirely upon him, (*not* upon the principal,) since it was contracted by him.

Evidence cannot be heard in support of any claim against a surety which does not come within the description in the contract of bail.

If a person become bail on the part of another, for whatever may be proved to be due by him, or for whatever the *Kāzee* may decree against him, and the debtor afterwards disappear, and a claimant offer to prove, by evidence, that the sum due to him is one thousand *dirms*, such evidence is not to be admitted; because here the bail is limited to whatever the *Kāzee* may decree, as is evident from the expression "Whatever the *Kāzee* may decree," and likewise from that of "Whatever may be proved to be due by him," since nothing can be proved but by the decree of the *Kāzee*, and the claim in question has not this limitation:—it is therefore invalid, and accordingly the evidence in support of it cannot be heard.

A decree passed against a surety in the absence of the principal cannot affect the latter unless the bail were

If a person prefer a claim before the *Kāzee* to this effect, "That an absentee owes him a thousand *dirms*, and that a particular person present is, by desire of the debtor, bail for the same," and establish his assertion by testimony, in that case the *Kāzee* must pass a decree against both the debtor and the surety.—If, however, the bail have

have been given *without* the desire of the debtor, the *Kázee* must in that case decree the debt solely against the surety; and in this instance the evidence adduced by the claimant is admitted as sufficient, because the bail is *absolute*, and not *qualified*, as in the preceding case.—It is to be observed that the different decrees which the *Kázee* gives in the case of bail *with*, and *without*, the desire of the debtor, (that is, the decree against *both*, in the one case, and against the *surety* only in the other,) is founded on the difference which obtains in the nature of these two modes of bail;—for bail by desire of the debtor is a gratuitous deed in the origin, and a contract of exchange in the end; but bail *without* the desire of the debtor is a gratuitous deed both in its origin and its consequences.—Now where the claim relates to *one* only, the decree cannot be extended to the other. But if a decree should be passed relative to a surety by desire, it must necessarily include the principal, since the desire he expressed is a virtual acknowledgment of the existence of the debt.—It is otherwise with respect to a voluntary surety; for as the existence of the debt in that case is proved by his belief of it, in having undertaken the bail with regard to it, and not by any virtual acknowledgment of the debtor, the decree is therefore solely referred to him.—In the *former* case, (namely, that of bail *by desire*,) the surety is authorized to receive from the seller what he may have been obliged to pay on his account.—*Ziffer* maintains that he is not entitled to such compensation; because, having himself refused to pay, and having been compelled to it, he is of consequence in his own opinion oppressed; and it is not permitted to such as are oppressed to oppress others.—Our doctors, on the other hand, argue that whenever a refusal is undone by law, the opinion founded upon it becomes of consequence null.

entered into
by his desire.

If a person sell a house, and another become *Kafeel-be'l-dirk*, or *security against accident**, on his behalf, the security so given is a direct

Case of Kafeel-be'l-dirk.

* *Dirk*, signifies, properly, *any possible contingency*. *Kafeel-be'l-dirk*, therefore, means *bail for what may happen*.—In the present instance it alludes to the possibility of a claim being afterwards set up to the house by some other person, which, if substantiated, would annul the sale.

declaration.

declaration of the house being the property of the seller.—If, therefore, the surety should afterwards prefer a claim of right to the house, such claim is inadmissible.—The reason of this is, that if the security be a condition of the sale, (as if the purchaser should have said, “ I will buy the said house, provided a particular person will be security against any future claim to it,”) in that case the completion of the sale rests upon the agreement of the surety; and afterwards, when he prefers a claim of right to the house, he endeavours to destroy that which he had himself rendered complete:—if, on the other hand, the security should *not* be a condition of the sale, the surety, in that case, by agreeing to the bail, did, as it were, incite the buyer to the bargain, (since his desire of purchase was founded on the procurement of bail.)—The bail so given, therefore, is equivalent to a declaration of the right of property of the seller.

An attestation to a contract of sale is not equivalent to *Kaful-be'l-dirk*.

If, in the sale of a house, a person should attest the bill of sale, and put his seal to it, without giving any security, such testimony and affixture of seal is not an acknowledgment of the seller's right of property, and hence the witness may, if he please, afterwards claim the house, because attestation is neither a condition of sale, nor a declaration of the property of the seller, as it sometimes happens that men sell their *own* property, and sometimes that of *others*.—Besides, the witness may have made this attestation merely as a memorandum of the transaction; a supposition which the case of *bail* could not admit of.—Lawyers have remarked that if it be expressed, in the bill of sale, that “ a certain person had sold such a house, *which is his property, by a complete and valid sale,*” and the person attest the writing to this effect, “ Witness thereto,” this is an acknowledgment and declaration of the seller's right of property.—If, on the other hand, he attest it thus, “ Witness to the agreement of the buyer and seller,” this is *not* a declaration of the seller's right of property.

SECTION.

Of ZAMINS, or GUARANTEES.

IF an agent sell the cloths of his constituent, and hold himself responsible for the payment of the price to his constituent,—or, if a *Mozdrib* sell the goods of his employer and hold himself responsible for the payment of the price,—the responsibility in either case is null: FIRST, because surety or bail is an engagement compelling the undertaker to answer a claim; and as, in these cases, the agent and *Mozdrib* are themselves the claimants for the price of the goods, it follows that if they were responsible for the same, they would be *security on their own behalf*, which is absurd:—and, SECONDLY, because the goods remain in their hands in the nature of a trust; and trustees are not held by the LAW to be liable to responsibility.—If, therefore, they were held responsible, it would be contrary to the precepts of the LAW.—Hence the taking of security from them is null, in the same manner as a condition of responsibility is null with respect to a trustee or a borrower.

The guarantee of agents to their employers is null.

IF two sharers in a slave sell him by one contract, and each of them be security to the other, on behalf of the buyer, for his payment of the proportion of the price due to that other, such security is null; because if the security were valid under a general copartnership in the price, it necessarily follows that each is in part security on behalf of *himself*, since every member of the slave is indefinitely shared between them;—or if, on the other hand, the security of each were valid with respect to the other's share in particular, this induces a division of a debt before the receipt of it, which is unlawful.—It is otherwise where two partners in a slave sell their shares by *different* contracts; as their security to each other, for the prices respectively due, is valid, since

The guarantee of partners, in a purchase and sale to each other, is null.

there is no *partnership* in this instance, because whatever is owing to each, respectively, in virtue of his particular contract, appertains solely to him, without any participation of the other;—whence it is that the purchaser is at liberty to accept the share of *one* of them only and to take possession of it, after the payment of the price; and also that he may take possession of the share of one of them only after paying to him his proportion, notwithstanding he may have purchased both shares.

Guarantee
for land-tax,
and all other
regular or just-
ifiable im-
posts, is *valid*.

If a person become security in behalf of another for tribute due by him, or for a *nawāyeeb* levied upon him, or for his *kiffmāt*, all such securities are valid.—Security for *tribute* is valid, because tribute is in the nature of a debt, and may be a lawful subject of claim, as has been already explained: (in opposition to *Zakāt*, as that is a matter solely affecting him who pays it, in the manner of a *gift*, and of which *his* property alone can be the subject;—whence, after his death, it cannot be discharged out of his effects, unless prescribed in his will:)—and with respect to *nawāyeeb*, if it extend only to what is just, (such as exactions for digging a canal, for the wages of safe guards, for the equipment of an army to fight against the Infidels, for the release of *Mussulman* captives, or for the digging of a ditch, the mending of a fort, or the construction of a bridge,) the security is lawful in the opinion of the whole of our doctors.—But if *nawāyeeb* extend to exactions wrongfully imposed, that is, to such as *tyrants* extort from their subjects, (as in the present age,) in that case, concerning the validity of security for it, there is a difference of opinion amongst our modern doctors.—*Sbeikh Imām Alee* is of the number of those who hold the security in this instance to be valid.—With respect to *kiffmāt*, there is a difference of opinion concerning the meaning of the word.—Some allege that it signifies the same with *nawāyeeb*; whilst others define

* *Nawāyeeb* are all extraordinary aids beyond the established contributions, levied at the discretion of government to answer any particular emergency of the state.

it to be the same with *Mowzifa Râtiba*, that is, fixed imposts which are exacted at stated periods, such as once in the month, or once in every two or three months.—Now *nawâyeeb* means the casual exactions made by the sovereign, which have no fixed or stated period. The law, however, is as above explained, with respect to both. If, therefore, the exaction be right, then the security for it is lawful, according to all our doctors; or if wrong, there is a disagreement with respect to the validity of the security.

IF a person say to another, “I owe you a debt of one hundred *dirms*, payable a month hence,” and the other assert that the debt is immediately due, his assertion, as claimant, is to be credited.—But if a person should declare to another, “I am security to you, in behalf of another, for a debt of one hundred *dirms* payable a month hence,” and the other assert that the debt is due immediately, the declaration of the surety is to be credited.—The difference between these two cases is, that in the *former* case the debtor makes an acknowledgment of the debt, and then claims his right to a suspension of payment for one month; whereas in the *latter* case the surety makes no acknowledgment of the *debt*, inasmuch as the obligation of the debt does not rest upon the bail or surety, as has been often before explained.—In fact, he has simply acknowledged a *claim*, to which he is responsible *after the lapse of a month*, which the claimant denies, asserting that he is answerable for such claim *immediately*;—and regard is paid, in LAW, to the affirmation of the defendant.—A clause of *suspension*, moreover, is merely an accidental property of a debt, and not an essential, whence it is that it cannot be proved unless it have been expressly stipulated.—The affirmation, therefore, of the person who denies the stipulation of such condition is creditable,—in the same manner as in the case of a condition of option, in sale.—*Bail under a suspension*, on the contrary, is one species of bail, in which the being *suspended* in its operation is an inherent quality, and not an accident; whence this species of suspension may be proved without

Difference
between a
suspended
debt and sus-
pended bail.

having been stipulated; as where, for instance, the debt due by the principal is a suspended debt. According to *Shafe'i*, the affirmation of the *claimant* is to be credited in either case; and the same is related as an opinion of *Aboo Yoozaf*.

Bail against
accident, in
the sale of a
slave.

IF a person purchase a female slave, and another warrant her to be the property of the seller*, and she afterwards prove to be the property of some *other* person, the purchaser is not entitled to exact the price from the surety, until the *Kázee* shall have first passed a decree against the seller for the restitution of the price;—because, according to the *Zábir Rawáyet*, the sale does not become null immediately on the proof of the subject of it being the property of another, but endures until the *Kázee* pass a decree in favour of the purchaser, directing the seller to return the price. Since, therefore, previous to the issuing the said decree, it is not incumbent on the principal (that is, the seller) to make restitution of the purchase money, so neither is it incumbent on the surety. It would be otherwise if the slave were proved to be *free*, and the *Kázee* pass a decree to that effect, for in such case the sale becomes null immediately on the issuing of such decree, since freedom is incapable of being the subject of sale, and the buyer would, therefore, be entitled to exact the purchase-money either from the surety or from the seller, without waiting for a decree of restitution from the *Kázee*.—It is related as an opinion of *Aboo Yoozaf*, that sale becomes null immediately on the proof of the subject of it being the property of another; and that, consequently, the buyer has in such case a right to exact the price either from the surety or the seller, without waiting for the decree of the *Kázee* to that effect.

Security for
fulfilment is
null.

IF a person purchase a slave, and another be security for the fulfilment of the bargain†, such security is null; because the word *Qbda*,

* Literally, "and another be bail against accident."

† Arab. *Zámin ba Qbda*.

[fulfilment] is of a comprehensive nature, as having a variety of meanings. I. It relates to the former bill of sale, which the seller received from the person who sold the slave to him; and this being the property of the seller, any security with respect to it is invalid. II. It relates to the contract and its rights. III. It relates to a warrant or security against accidents. And, IV. To option.—As, therefore, the term comprizes so many things, the particular application of it is dubious; and hence practice cannot take place upon it.—It is different with respect to the term *dirk*, for although that signify *whatever may happen*, yet the custom of mankind has restrained the application of it to one particular sense, namely, a *security against any future claim*; and *Zimán-be'l-dirk*, or security against accident, is therefore valid.

If a person sell an article, and another be security to the purchaser for the release* of that article, such security is invalid, according to *Haneefa*, as the intention of it is the release of the article, and the delivery of it to the purchaser, which the security is not competent to perform.—The two disciples hold this to be valid, as in their opinion it is equivalent to a security against accident;—in other words, it imports an obligation to deliver to the purchaser either the article sold, the value, or the price;—and such being the case, it is valid of course.

Security for a
surrender of
the article to
the purchaser
is invalid.

* Arab. *Khilâs*: meaning, the *surrender* of the article, by the seller, to the purchaser.

C H A P. II.

Of Bail in which two are concerned.

Case of two persons who are joint principals in a debt, and bail for each other.

IF two men owe a debt in an equal degree, and each be security on behalf of the other,—as where, for instance, two persons purchase a slave, jointly, and each is security on behalf of the other,—in this case, if either of them pay off a part, he has no right to make any claim on the other:—unless, however, the payment so made exceed a half of the whole debt, in which case he has a right to exact such excess from the other.—The reason of this is, that each of them is a principal with respect to one half of the debt, and a security with respect to the other half;—for what each owes in virtue of his being a principal is no bar to the obligation upon him as a security, the one being founded on debt, and the other on a claim, which is subordinate thereto.—Whatever payments, therefore, either of them may make are held to be in virtue of the former, namely, the debt, as far as that extends; and any excess is referred to the latter, namely, the security.

Case of two persons who are bail for a third, to the amount of the whole claim, and also, reciprocally, bail for each other's security.

IF two persons be *bail for property* in behalf of another,—in this way, that each surety, respectively, holds himself responsible for the other surety,—in this case, whatever either surety may pay, [in virtue of the bail,] whether the sum be great or small, he is entitled to exact the half of it from the other surety.—This proceeds upon a supposition that each of these two sureties, respectively, is bail for the whole property on the part of the principal, and likewise for the whole obligation on the part of his co-surety. Hence in each of the two sureties two bails are united; one on behalf of the principal, and one on behalf of the co-surety; and bail on behalf of a *surety* is lawful, in the same manner

manner as on behalf of a *principal*, or as a transfer on behalf of a transferee; because the intention of a contract of bail is *undertaking the obligation of a CLAIM*; and this end is answered by bail on behalf of a surety.—As, therefore, two bails are in this case united in each of the sureties, it follows that whatever payments are made by either of them are made, in an indefinite manner, on account of both; for the payment so made was purely in virtue of the bail; and each, with respect to the bail, stands in the same predicament; that is to say, neither has a superiority over the other.—(It is otherwise where each surety is a *principal* with respect to part of the debt, as in the *first* example; for in this case neither has a right to exact any thing from the other on account of the payments he may make, unless such payments exceed the sum for which he is a principal, because the principal has a superiority.)—Now since, in the case in question, whatever payments either of the two may make are made indefinitely, on account of both, it follows that the person making such payments is intitled to exact the half of them from the other. And this induces no unnecessary revolution, because the intention of the contract, in the present instance, is that the parties be on a footing of perfect equality with respect to the bail, which can only be answered by the one party taking from the other the half of what he may have paid.—The other, therefore, is not entitled to retake it again from the person who has first paid, because this, if permitted, would destroy the equality already established.—(It is otherwise in the *preceding* case, for there each of the parties is a principal with respect to a portion of the debt, and consequently they are not on a footing of perfect equality with respect to the bail.)—When, however, one of the parties shall have taken the half from the other, then they are jointly entitled to exact the whole of what has been paid from the principal; since they paid the same on his behalf; the one making the payment immediately from himself, and the other doing it, as it were, by his substitute:—or the surety who paid is at liberty, if he please, to exact the whole of what he paid from the principal, because he was bail for the whole of the property by
by

by his desire.—If, in this instance, the creditor *exempt* one of the two sureties, he has a right to claim the whole from the other, because the exemption of a surety does not operate as an exemption in favour of the principal, and therefore the whole of the debt remains due by the latter; and the remaining surety being still bail for the *whole* of the property, it is consequently lawful to claim the whole from him.

In the dissolution of a reciprocity partnership, each partner is responsible for any debts contracted under their partnership.

If two partners by reciprocity dissolve their copartnership, and separate, whilst some of their debts still remain due, the creditors have in that case a right to claim the whole from whichever of them they please; because each of these partners is surety for the other, as has been already explained in treating of partnership.—Neither of the partners, moreover, has a right to make any claim upon the other for whatever payment he may have made to the creditors, unless such payment exceed the half of the debt, in which case he has a right to exact from him the payment of such excess, for the reason already explained, in discussing the case of reciprocal bail by two.

Case of two *Mokâtibs*, bail on each other's behalf, for their ransom.

If a master constitute two of his slaves *Mokâtibs*, by one contract, for a thousand *dirms*, (for instance) and each of them become bail for the other, in that case, whatever sum, from the whole amount covenanted to be paid by the master, is discharged by either, the half of that sum may be exacted from the other.—Analogy would suggest that the bail, in this instance, is not valid; because bail is valid only when opposed to a valid debt: and the consideration of *Kitâbat*, or the degree of freedom bestowed upon a *Mokâtib*, is not a valid debt, as has been already explained.—It is lawful, however, upon a favourable construction, by considering each of the slaves as a principal with respect to the obligation of the whole consideration of *Kitâbat*, namely, a thousand *dirms*;—in other words, by considering each of them, respectively, as being responsible to the master for the payment of the whole; and, consequently, that upon his making payment of the whole,

whole, the other obtains his freedom as a dependant,—in this way, that the freedom of both is suspended on their payment of one thousand *dirms*, and the master is at liberty to claim the said thousand from each of them; respectively, as a *principal*, not as a *surety*. Each, however, is considered as surety on behalf of the other, with respect to exacting a moiety of what he pays on account of the consideration of *Kitábat*.—(A particular explanation of this will hereafter be given in treating of *Mokátibs*.)—From the explanation of the law in this case it appears that both slaves are equal with respect to the payment of the thousand *dirms*, which is the consideration of their *Kitábat*; and hence each is respectively entitled to take from the other a moiety of whatever part of the said thousand *dirms* he may pay.—If the master, in this case, should emancipate one of the slaves prior to his having made any payment on account of his *Kitábat*, in that case he becomes free; because his master, whose property he then was, chose to emancipate him.—He becomes likewise exempted from any obligation to pay his half of the consideration of *Kitábat*, because he acquiesced in that obligation merely as a means to obtain his freedom: but upon his becoming free in consequence of the emancipation of his master it exists no longer as a mean, and therefore ceases altogether.—The obligation, however, for the payment of an half, still continues incumbent upon the *other*, who remains a slave; because the whole amount of the consideration was opposed to the bondage of both; and the whole was considered as due from each, respectively, merely as a device, in order to render the bail of each in behalf of the other valid, and thereby to enable each to take from the other a moiety of what he pays.—But when the master emancipates *one* of them, there exists no further necessity for this device; whence the debt is then considered as opposed to them both, *jointly*. (not, *in toto*, to each respectively.) and is accordingly divided into two separate parts, of which one still continues due from him who remains a slave.—In taking this portion, the master is at liberty either to exact it from the *freedman*, in virtue of his being *security*, or from the *slave*, because of his being the

principal.—If he take it from the freedman, the freedman is then entitled to retake it from the slave, because of his having paid it by his desire: but if he take it from the slave, he [the slave] is not entitled to take any thing from the freedman, because he merely pays a debt which he justly owes.

C H A P. III.

Of Bail by *Freemen* in behalf of *Slaves*, and by *Slaves* in behalf of *Freemen*.

A person becoming surety on behalf of a slave for a claim, to which the slave is not liable until after emancipation, must discharge it immediately.

If a person be surety in behalf of a slave, for some thing not claimable from the slave until after he recover his freedom, without specifying whether the thing in question is claimable immediately, or hereafter, in that case it is to be considered as immediately due;—that is to say, it is claimable immediately from the surety.—For instance, if an inhibited slave acknowledge his destruction of the property of any person,—or that he owes a debt which his master disavows,—or if, having married without the consent of his master, he should have had carnal connexion with the woman on the supposition of such marriage being valid, (in all which cases nothing could be exacted from the slave *immediately*, nor until he become *free*,) and a person be a surety for the compensation eventually claimable from the slave, he is liable to an *immediate* claim for it. The reason of this is, that the slave ought immediately to discharge the compensation, because there exists an evident cause of its obligation upon him, and a slave, in virtue of his being a MAN, is capable of being subject to obligation. He is, however, exempted from an *immediate* claim for the compensation,

compensation, because of his poverty, since every thing he possesses is the property of his master, and his master is not assenting to the obligation. The surety, on the contrary, is not poor, and is therefore liable to the claim *immediately*, in the same manner as a person who becomes surety for an *absentee* or a *pauper*.—It is otherwise where a person becomes bail for a *debt* not immediately due, for there the *surety* also is not liable to an immediate claim, any more than the debtor, since the debt is suspended in its obligation to a future period by the consent of the creditor.—It is, however, to be observed that, in the case in question, the surety, on discharging the claim upon the slave, is not entitled to demand it from the slave until he shall have obtained his freedom; because the creditor had no right to demand it until that event; and the surety stands in the place of the creditor.

If a person advance a claim on an unprivileged slave, and another become surety for his person, and the slave afterwards die, the surety is in that case released from his engagement, because of the *principal* being released.—(The law is the same where the slave, in whose behalf bail for the person is given, is *emancipated*.)

Bail for the person of a slave is cancelled by his death.

If a person claim the right of property in a slave, and another become surety in behalf of the possessor of him, and the slave then die, and the claimant establish his right by witnesses, the surety is in that case responsible for the price;—because it was incumbent on the possessor to repel the claim, or, if he failed in so doing, to give the value for which the surety became answerable; and as the obligation, after the slave's death, rests upon the principal, so also it now rests upon the surety.—It is otherwise in the *preceding* case; for there the obligation was merely to produce the *person* of the slave, which is cancelled by his death.

Bail to a claim of right in a slave subjects the surety to responsibility in the event of the slave's decease.

Bail by a slave in behalf of his master, or by a master in behalf of his slave, does not afford any ground of claim by the surety upon the principal.

IF a slave, who is not in debt, be surety for property in behalf of his master, or any other man, and be afterwards made free, and then pay the amount for which he was surety,—or, if a master become surety for property in behalf of his slave, whether he be indebted or not, and after emancipating him, pay the amount for which he stood security, in neither of these cases is either of the parties entitled to take any thing from the other.—*Ziffer* maintains that in both these cases the parties have a right to recur to each other; that is, each is entitled to take from the other what he may have paid.—(it is here proper to remark that the reason for restricting the slave, in the first case, to one that is *free from* debt is, that if he were otherwise, he could not be surety for property in behalf of his master, since this would affect the right of his creditors.—The argument of *Ziffer* is that a ground of claim, (namely, bail by desire of the principal,) exists in both cases; and the bar to its operation (namely, *slavery*) is removed and done away.—The argument of our doctors is that the bail in these cases is not in the beginning a ground of claim, since neither can the master have a debt due to him by his slave, nor can the slave have a claim of debt upon his master.—Hence as no ground of claim existed in the beginning, it does not afterwards take place, in consequence of the removal of the bar to it, (namely, slavery;) for the law here is the same as where a person becomes surety for another without his desire, in which case the subsequent assent of the surety is of no effect.

The consideration of *Kitābat* is not a subject of bail:

BAIL for the consideration of *Kitābat*, whether the surety be a slave or a freeman, is not valid; because the consideration of *Kitābat* is allowed to exist as an obligation merely from necessity, it being repugnant to reason, inasmuch as a master cannot have a claim of debt upon his slave; and in the case in question the *Mokātib*, or person who owes the consideration of *Kitābat*, is supposed the slave of the claimant.—Hence the consideration of *Kitābat* is not so fully established as to admit of bail for it,—because wherever a thing is established from necessity,

cessity, it is restricted entirely to the point of necessity. Besides, the debt of *Kitâbat* ceases entirely in case of the inability of the slave to discharge it; nor is it possible to revive it, by claiming it from the surety, because the meaning of bail is “*the junction of one person to another person in relation to a claim.*—As, therefore, the claim does not operate upon the principal, it of consequence ceases with regard to the surety; because it is a rule that a principal and his surety are both equally liable for the same claim.

A CONSIDERATION, in lieu of emancipatory labour, resembles the consideration of *Kitâbat*, in the opinion of *Haneefa*, because, (according to him,) a slave that works out his freedom by labour is in the same predicament with a *Mokdtib*.

nor a consideration in lieu of emancipatory labour.

H E D A R A.

B O O K XIX.

Of *HAWALIT*, or the *TRANSFER* of *DEBTS*.

Definition of
terms.

HAWALIT, in its literal sense, means a *removal*; and is derived from *Tabool*, which imports the removal of a thing from one place to another.—In the language of the LAW it signifies the removal or transfer of a debt, by way of security and corroboration, from the faith of the original debtor, to that of the person on whom it is transferred. The debtor or person who transfers the debt is termed *Mabeel*: the transferee, or person upon whom the debt is transferred, *Mobtal-ali bee*, and the creditor, or transfer receiver, *Mobtal*.

THE

THE transfer of a debt is lawful; because the prophet has said, *The transfer of a debt*
 “ *Whenever a person transfers his debt upon a rich man, and the*
 “ *creditor assents to the same, then let the claim be made upon the*
 “ *rich man;*” and also, because the person upon whom the debt is
 transferred undertakes a thing which he is capable of performing;
 whence it is valid, in the same manner as bail.—It is to be observed,
 however, that transfer is restricted to debt; because it means an *ideal*
 removal; and an *ideal* removal, in LAW, applies to *debt*, and not to
substance, which requires a *sensible* removal.

A CONTRACT of transfer is rendered valid by the consent of the
 creditor and transferee. The consent of the creditor is requisite, be-
 cause the debt (the thing transferred) is his due; and mankind being
 of different dispositions with respect to the payment of debts, it is
 therefore necessary to obtain his consent.—The consent of the *transferee*
 is also requisite, because by the contract of transfer an obligation of
 debt is imposed upon him, and such obligation cannot be imposed with-
 out his consent.—The consent of the *principal*, on the contrary, is not
 requisite, because (as *Mohammed* observes in the *Zeeadūt*) the engagement
 of the transferee to pay the debt is an act relative to himself, which is
 attended with a benefit to the principal, and is no way injurious to
 him, inasmuch as the transferee has no power of reverting to him, in
 case of having accepted the obligation without his desire.

WHEN a contract of transfer is completed, the *Mobeel*, or person
 who makes the transfer, is exempted from the obligation of the debt,
 because of the acquiescence of the transferee.—*Ziffer* has said that he
 is not exempted, because of the analogy which subsists between this
 case and that of bail; for they are both contracts of security or corro-
 boration; and as, in the case of bail, the person who is bailed
 does not become exempted from the debt, so neither ought the trans-
 ferrer in this case.—Our doctors, on the other hand, agree that *Ha-*
wālit literally means *removal*; and when a debt is removed from the
 faith

faith of one person, it cannot afterwards remain upon it.—Bail, on the contrary, means a junction; and the intendment of it is, that the bailer unites his faith to that of the suretee with respect to the claim.—Now the decrees of the law proceed according to the literal meaning; and the object of transfer, namely, *corroboration*, is obtained when a person that is rich and a fair dealer acquiesces in the obligation of the debt, as it is to be supposed that he will readily fulfil his obligation.

OBJECTION.—If the debt shift from the faith of the debtor to that of the transferee, it would follow that there can be no compulsion on the creditor to receive payment from the debtor, where he offers to discharge the debt; in the same manner as a creditor is not compellable to receive payment of his debt from a stranger in a gratuitous manner.

REPLY.—The creditor is compellable to receive payment of the debt from the debtor, if he offer to make payment, because the claim may eventually revert upon him, in case of the destruction of the debt; since if the transferee were to die insolvent, without having paid the debt, the claim would revert upon the transferrer, for reasons that will be shewn in the next case.—Hence, the payment of the transferrer cannot in every respect be considered as *gratuitous*, like that of a *stranger*.

unless the transferee deny, or become unable to fulfil, his engagement.

THE creditor is not entitled to make any claim upon the transferrer, excepting where, his right on the transferee being destroyed, he cannot otherwise obtain it; in which case the debt reverts upon the transferrer.—*Shaf'ei* alleges that the creditor has no right to make any claim for his due upon the transferrer, although his right be destroyed; because, in consequence of the transfer, the transferrer becomes exempted from the debt; and this exemption is absolute, and not restricted to the condition of payment from the transferee.—Hence the debt cannot revert upon the transferrer, except on account of some new cause; and none such is to be found in this case.—The

argument of our doctors is that, although the exemption be absolute, in the *terms* of the contract, yet it is restricted, in the *sense*, to the condition of the right being rendered to the creditor. The transfer is therefore dissolved in case of his right being destroyed; because the contract is capable of dissolution, and may be dissolved by the agreement of the parties.—The condition, moreover, of the safe delivery of the debt to the creditor, is equivalent to that of warranting the subject of a sale to be free from blemish; that is to say, such a warranty implicitly exists, as a condition, in *every* sale, although it be not specifically mentioned; and, in the same manner, the security of the debt exists, as a *condition*, in a contract of transfer, although not specified in it.—The destruction of the debt due to the creditor in a case of transfer is established, according to *Haneefa*, by one of two circumstances. I. Where the transferee denies the existence of the contract, upon oath, and the creditor cannot produce witnesses to prove it. II. Where the transferee dies poor.—In the event of either of these circumstances the debt is destroyed, since in neither case is it practicable for the creditor to receive payment from the transferee.—This is the true meaning of a destruction of the debt in a case of transfer.—The two disciples maintain that a destruction of the debt is occasioned by one of *three* circumstances. Of these, two are the same with those above recited; and the *third* is,—a declaration, by the magistrate, of the poverty of the transferee during his life-time.—This third circumstance is not admitted by *Haneefa*; because, according to his doctrine, poverty cannot be established by the decree of the magistrate, since property comes in the morning and goes in the evening; but, according to the two disciples, the decree of the magistrate establishes poverty.

If the transferee should demand, from the transferrer, the amount of what he has paid in virtue of the transfer made upon him, and the transferrer affirm that “he had made such transfer upon him, in exchange for a debt of the same amount which *he* owed him,” the affirmation of the transferrer is not admissible, and he is bound to pay the demand of the transferee, because the

The transferee has a claim upon the debtor for what he transfers upon him.

reason of such demand, (namely, *the actual payment of it by his desire*) is established.—The transferrer, moreover, asserts a claim which the other denies; and the affirmation of the defendant is creditable.

OBJECTION.—It would appear that the affirmation of the transferee is not to be credited, although he be the defendant; because he has acknowledged what he afterwards denies, inasmuch as his acceptance of the transfer is a virtual acknowledgment of the debt he owes to the transferrer.

REPLY.—The acceptance of the transfer is not an acknowledgment of debt due to the transferrer, because contracts of transfer are sometimes made without the transferee's owing any thing to the transferrer.

A debtor may transfer his debt upon a property in the hands of another person.

IF a person, having deposited a thousand *dinars* with another, should afterwards make a transfer on it, (as if he were to desire his creditors to receive payment of his debt, from a deposit placed by him with such a person,) such transfer is valid, because the trustee is capable of discharging the debt from the deposit.—If, however, the deposit be destroyed, the transferee (who is otherwise a *trustee*) is in such case released from the engagement of transfer; because the transfer was restricted to the deposit, since the trustee engaged no further than the payment of the debt from the amount of the actual deposit.—It is otherwise with respect to a transfer restricted to *usurped* property; for if a person were to make a transfer on an usurper, on account of specific property usurped by him, and the said property be afterwards destroyed, the transfer so made does not become null: on the contrary, it is incumbent on the usurper to pay the creditor a similar,—or the value, in case the property in question had not been an article of which the unities were similar;—because, as a similar or the value is a representative of the thing itself, the property in this case is not held to have been destroyed.

It is to be observed that transfers are sometimes restricted to debts due by the transferee to the transferrer;—and in all cases of such restricted transfers, the law invariably is that the transferrer has no right to make any claim upon the transferee, for the substance or the debt upon which he has made such transfer; because the right of the creditor is connected with it, in the same manner as that of a pawnholder is connected with the pawn; and also because, if such a right remained with the transferrer, the act of transfer (which is the right of the creditor) would be rendered null.—It is otherwise with respect to an *absolute* transfer; (that is, where a person simply says to his creditor “ I have transferred the debt I owe you upon a particular person,” without making any mention of debt being due to him, or of specific property of his being in the possession of that person, whether from deposit or usurpation;) for in this case the right of the creditor does not relate to the property of the transferrer, but rests entirely upon the faith of the transferee; and hence if the transferrer should receive payment of the substance or debt due to him from the transferee, still the transfer does not become null.

A transfer may be restricted to what is due from the transferee to the debtor.

SIFITJA is abominable†; *that is to say*, the giving of a loan of any thing in such a manner as to exempt the lender from the danger of the road; as, for instance, where a person gives something by way of loan, instead of a deposit, to a merchant, in order that he may forward it to his friend at a distance.—The abomination in this case is founded on the loan being attended with profit, inasmuch as it exempts the lender from the danger of the road; and the prophet has prohibited our acquiring profit upon a loan.

The loan of money in the manner of *Sifitja* is disapproved.

† That is to say, it is disapproved, although not absolutely *illegal*. (See the meaning of the term *abominable*, p. 428.)

H E D A R A.

B O O K XX.

Of the Duties of the K A Z E E.

- Chap. I. Introductory.
Chap. II. Of Letters from one *Kázee* to another.
Chap. III. Of Arbitration.
Chap. IV. Of the Decrees of a *Kázee* relative to inheritance.
-

C H A P. I.

A Kázee must possess the qualifications of a witness.

THE authority of a *Kázee* is not valid, unless he possess the qualifications necessary to a witness; that is, unless he be free, sane, adult, a *Mussulman*, and unconvicted of slander; because the rules with respect to jurisdiction are taken from those with respect to evidence, since both are analogous to *authority*; for *authority* signifies *the passing or giving effect to a sentence or speech affecting another, either with or without his consent*; and evidence and jurisdiction are both of this nature.

nature.—(The rules with respect to jurisdiction are here said to be “*taken from those with respect to evidence*,” because, as the sentence of the *Kázee* is in conformity with the testimony of the witness, it follows that the evidence is, as it were, the *principal*, and the decree of the *Kázee* the *consequent*.)—As therefore, jurisdiction, like evidence, is analogous to authority, it follows that whoever possesses competency to be a witness is also competent to be a *Kázee*; and also, that the qualifications requisite to a witness are in the same manner requisite to a *Kázee*—and likewise, that an unjust* man is qualified to be a *Kázee*; whence if such a person be created a *Kázee*, it is valid, but still it is not *adviseable*; in the same manner as holds with respect to evidence;—that is, if a *Kázee* accept the evidence of an unjust man, it is valid, in the opinion of all our doctors; but still it is not *adviseable* to admit the testimony of such a person, since an unjust man is not deserving of credit.

If a *Kázee* be a just man at the time of his appointment, and afterwards, by taking of bribes, prove himself an unjust man, he does not by such conduct become discharged from his office,—but he is, nevertheless, *deserving* of a dismissal.—This is the doctrine of the *Záhir Rawdyet*; and it has been adopted by modern lawyers.—*Shafëi* maintains that an unjust man is incapable of the office of *Kázee*, in the same manner as (in his opinion) he is incompetent to give evidence.—It is related in the *Nawadir*, as an opinion of our three doctors, that an unjust man is incapable of discharging the duties of a *Kázee*.—Some of the moderns have also given it as their opinion that the appointment of a man *originally* unjust, to the office of *Kázee*, is valid; but that if, having been just at the time of his appointment, he afterwards be-

He does not
forfeit his of-
fice by mis-
conduct.

* Arab. *Fásh*.—In some instances the term applies merely to a person of loose character and indecorous behaviour. (See Vol. I. p. 74.) In the present instance, however, the character also includes *want of integrity*, as appears a little lower down.

come unjust, he stands discharged from his office; because, as the Sultan appointed him from a confidence in his integrity, it is to be presumed that he will not acquiesce in his discharge of the duty *without* integrity.

A *Mooftee* must be a person of good character.

A QUESTION has arisen, whether an unjust man be capable of being a *Mooftee**; and on this subject different opinions have been given.—Some have said that he is incapable of being a *Mooftee*, because the giving of a *Fitwa* (or statement of the law applicable to any case) is connected with religion, and the word of an unjust man is not creditable in matters relative to religion.—Others again have said, that an unjust man is capable of being a *Mooftee*, because of the probability that he will toil and labour in the discharge of his duty, lest the people charge him with his faults. The former, however, is the better opinion.—Some have established it as a condition, that a *Kázee* be a *Moostabid*†: the more approved doctrine is, however, that this is merely *preferable*, but not *indispensable*.

An ignorant person may be appointed a *Kázee*.

THE appointment of an *ignorant* man to the office of *Kázee* is valid, according to our doctors.—*Shafëi* maintains that it is not valid; for he argues that such appointment supposes a capability of issuing decrees, and of deciding between right and wrong; and these acts

* *Angice*, an expounder of the LAW.—As the offices of *Kázee* and *Mooftee* are frequently confounded by European writers, it may not be improper to remark, in this place, that the word *Kázee* (or *Cadi*) is derived from *Kāzā*, signifying *jurisdiction*, and *Mooftee* from *Fitwa*, meaning an *application* or *statement* of the LAW.—The *Mooftee*, therefore, is the officer who *expounds* and applies the law to cases, and the *Kázee* the officer who gives it operation and effect.

† *Moostabid* is the highest degree to which the learned in the law can attain, and was formerly conferred by the *Mad-risas*, (or colleges); of which one of the first instances occurs in the life of *Han-isa*, whom all the learned acknowledge as their superior.

cannot

cannot be performed without knowledge.—Our doctors, on the other hand, argue that a *Kazee's* business may be to pass decrees merely on the opinions of others.—The object of his appointment, moreover, is to render to every subject his just rights; and this object is accomplished by passing decrees on the opinions of others.

It is incumbent on the Sultan to select for the office of *Kazee* a person who is capable of discharging the duties of it, and passing decrees; and who is also in a superlative degree just and virtuous; for the prophet has said, “*Whoever appoints a person to the discharge of any office, whilst there is another amongst his subjects more qualified for the same than the person so appointed, does surely commit an injury with respect to the rights of God, the PROPHET, and the MUSSULMANS.*”—It is to be observed that a *Moojtahid* means either a person who is in a high degree conversant with the *Hadees* or actions and traditional sayings of the prophet, and who has also a knowledge of the application of the law to cases; or one who has a deep knowledge of the application of the law to cases, and also some acquaintance with the *Hadees*.—Some have said that he ought also to have a knowledge of the customs of mankind, as many of the laws are founded upon them.

It is the duty of the sovereign to appoint fit persons to that office.

THERE is no impropriety in selecting for the office of *Kazee* a person who has a thorough confidence in his ability to discharge the duties of it; because the companions of the prophet accepted this appointment; and also, because the acceptance of it is a duty incumbent on mankind.

A person may be appointed who has a confidence in his own abilities:

It is abominable to select a person for the office of *Kazee* who suspects that he is incapable of fulfilling the duties of it, and who is not confident of being able to act with a strict regard to justice, because the selection of such a person is a cause of the propagation of evil.—Several of our doctors, however, have said that the acceptance of the office of *Kazee* without compulsion is abominable, because the prophet

but not one who is dubious of himself.

has said, “ *Whoever is appointed Kázee suffers the same torture with an animal, whose throat is mangled, instead of being cut by a sharp knife.*”—Many of the companions, moreover, declined this appointment; and *Haneefa* persisted in refusing it, until the Sultan caused him to be beaten in order to enforce his acceptance of it; but he suffered with patience rather than accept the appointment. Many others, in former times, have also declined this office.—*Mohammed* remained thirty and odd days, or forty and odd days, in imprisonment, and then accepted the appointment.—In fact, the acceptance of the office of *Kázee*, with an intention to maintain justice, is approved, although it be more laudable to decline it; because it is a great undertaking, and notwithstanding a person may have accepted it from an opinion that he should have been able to maintain justice, yet he may have erred in this opinion, and afterwards stand in need of the assistance of others when such assistance is not to be had.—Hence it is most laudable to decline it;—unless, however, there be no other person so capable of discharging the duties of it, in which case the acceptance of it is an incumbent duty, as it tends to preserve the rights of mankind, and to purge the world of injustice.

The appointment must not be solicited or coveted.

It becomes *Mussulmans* neither to covet the appointment of *Kázee* in their hearts, nor to desire it with their tongues; because the prophet has said, “ *Whosoever seeks the appointment of Kázee shall be left to himself; but to him who accepts it on compulsion, an angel shall descend and give directions;*” and also, because whosoever desires this appointment shews a confidence in himself, which will preclude him from instruction; and whoever, on the other hand, puts his trust in God, will be secretly inspired with a knowledge of what is right in the discharge of his office.

It is lawful to accept the office of *Kázee* from a tyrannical Sultan*, in the same manner as from a just Sultan; because some of the com-

* The term *tyrannical*, when applied to a *sovereign*, generally signifies his being an *usurper*.

panions accepted this office from *Mosviab**, notwithstanding the right of government during his time remained with *Alee*; and also, because some of the followers† accepted it from *Hijāj*‡, who was a tyrant.—Hence the acceptance of the office of *Kāzee* from a tyrant is lawful;—provided, however, the tyrant do not put it out of the power of the *Kāzee* to render right to the people; for otherwise the acceptance of it would not be lawful, as the end of the appointment could not then be answered.

WHENEVER a person is appointed to the office of *Kāzee*, it is incumbent on him to demand the *Devān* of the former *Kāzee*.—By the *Devān* is meant the bags in which the records and other papers are kept; for those must be preserved to serve as vouchers on future occasions.—These bags, therefore, must always remain in the hands of the person possessing the judicial authority; and as the judicial authority rests, for the time being, with the person appointed to the office, he must therefore require them from the *Kāzee* who has been dismissed.—It is to be observed that the papers, in which such proceedings &c. are written, must necessarily be the property either of the public treasury, of the litigants, or of the dismissed *Kāzee*.—Still, however, in all these cases, the new-appointed *Kāzee* has a right to demand them from the late one:—in the *first* case, evidently; and in the *second*, because the litigants left the said papers in the hands of the late *Kāzee*, that he

A *Kāzee*, on his appointment, must take possession of all the records, &c. appertaining to his office.

* *Mosviab*, the son of *Alee Sifwan*. He had been originally appointed, by *Othman*, to the government of Syria; and suspecting *Alee* to be instrumental to the death of his patron *Othman*, (who was sometime after slain in an insurrection) refused to acknowledge him on his being elected to succeed *Othman*, and in the end obtained the *Khalifat* for himself, being the first *Khalif* of the house of *Ommiah*, commonly termed the *Ommiad Khalif*.

† Arab. *Tabayer*.—A title given to those doctors, &c. who succeeded the *Ishāb*, or companions of the prophet.

‡ *Hijāj Bin Yoofool Sākif*.—He had been originally appointed Governor of Arabian *Irāk* by *Abdumalik*, the 5th *Khalif* of the house of *Ommiah*, after which he defeated *Abdalla bin Zabair*, who had assumed the title.

might act according to them; and as his power of action afterwards devolves upon the new *Kāzee*, he is of course entitled to receive them; and also in the *third* case, because the late *Kāzee* did not preserve them as *property*, but merely as the *instruments of justice*; and hence it is the same as if he had devoted them to the public.

through his
Ameens, who
must investi-
gate the na-
ture of them,

It is requisite that the new *Kāzee* send two *Ameens**, in order to take possession of the bags of the *Dewan* in the presence of the late *Kāzee*, or in the presence of his *Ameen*. It is also necessary that they ask and inquire of the late *Kāzee*, which are the papers that register his proceedings? and which are those that establish guardians for the property of orphans? and that then the late *Kāzee* arrange the several descriptions of papers in different bags, in order that no doubt may arise to the new *Kāzee*.—It is to be observed, however, that this investigation is merely for the sake of knowledge, and not for the purpose of impeachment.

and must in-
quire and de-
cide concern-
ing prisoners
confined up-
on any legal
claim,

It is requisite that the new-appointed *Kāzee* examine into the state of the prisoners, because this is one of the duties of his office.—Whoever of them makes an acknowledgment of right in favour of others, the new *Kāzee* must render it obligatory upon him, as acknowledgment induces obligation on the acknowledger.—Whoever of them, on the contrary, makes a *denial*, the new *Kāzee* must not credit the affirmation of the late *Kāzee* with respect to him unless supported by evidence, because, in consequence of his dismissal, his affirmation carries no more authority than that of any of the people in general; and the evidence of one person is not proof, more especially when such evidence relates to an action of his own.—If the late *Kāzee* should not be able, in this last instance, to produce evidence, still the new one must not immediately release such prisoner; on the contrary,

* *Amyias*, trustees or confidants. It is the name of an office in the *Kāzee's* court, in the manner of a *register*. It also signifies an *inquisitor*.

he must issue proclamation and use circumspection; that is, he must cause a person to proclaim, every day, that "the *Kāzee* directs that "whosoever has any claim against such a prisoner do appear and be "confronted with him."—If any person appear accordingly, and prefer a claim against the prisoner, the *Kāzee* must desire him to produce evidence:—but if no person appear, he must then release the prisoner, provided he see it adviseable.—He must not, however, *precipitate* his enlargement, before these precautions have been taken; because the imprisonment of him by the former *Kāzee* having been done apparently with reason, it is probable, if he should hastily release him, that the claimant against him might lose his right.

It is requisite that the new *Kāzee* examine into the *deposits**, and also concerning deposits of contested property, which the dismissed *Kāzee* may declare to be in the hands of particular persons, and also into the proceeds arising from the *Wakfs* [charitable appropriations] of *Mussulmans*,—and that he act with these according to such evidence as may be established concerning them, or according to the acknowledgment of the person in whose hands are the deposits or the proceeds of *Wakfs*, because evidence and acknowledgment are both proofs:—but he must not credit the affirmation of the late *Kāzee*;—unless the person in whose hands the property lies avow that "the said property was given in charge to him by the *Kāzee*;" in which case the new *Kāzee* may credit the affirmation of the old one with regard to such property, as it here appears, from the trustees acknowledgment, that the property in question *had been* in the possession of the dismissed *Kāzee*, whence it may be said to be *still* in his hands:—his affirmation, therefore, with respect to such property, must, in this case, be credited.—This proceeds on a supposition that the actual possessor had *from the beginning* acknowledged the dismissed *Kāzee*'s consignment of the property to him: for

* Meaning, controverted property, held by the *Kāzee* until the issue of the suit or litigation, and which he delivers over to some person to keep, in the manner of a trust.

if he should first have declared "this property belongs to Zeyd," (for instance,) and afterwards, "the dismissed *Kâzee* deposited this with "me," and the *Kâzee* affirm it to be the property of some *other* than Zeyd, in this case he [the possessor] must give the property to Zeyd, in favour of whom he made the first acknowledgment, as his right is rendered preferable by such acknowledgment; and he must then give a compensation, also, to the dismissed *Kâzee*, because of his having afterwards acknowledged that "the said property was in his custody;"—and the dismissed *Kâzee* must give the compensation so received to the person in favour of whom he makes the affirmation.

He must execute his duty in a mosque—or other public place.

It is requisite that the *Kâzee* sit openly in a mosque for the execution of his office, in order that his place may not be uncertain to travellers or to the inhabitants of the town.—The *Jâma* mosque* is the most eligible place, if it be situated within the city, because it is the most notorious.—*Shaf'î* maintains that it is abominable for a *Kâzee* to sit in a mosque for the execution of his duty, since polytheists are admitted into the court of the *Kâzee*, and these are declared in the KORAN to be *filth*.—Moreover, women during their monthly courses may enter the court of the *Kâzee*, but are not allowed admission into a mosque.—The arguments of our doctors on this point are twofold. FIRST, the prophet has said "*mosques are intended for the praise of "God and the passing of decrees;"*" and he moreover decided disputes between litigants in the place of his *Yettekâf* [a particular penance] by which must be understood a mosque: besides, the *Rafsedian Kbalifs* sat in mosques, for the purpose of hearing and deciding causes.—SECONDLY, the duty of a *Kâzee* is of a pious nature, and is therefore performed in mosques in the same manner as prayers are offered there.—In answer to *Shaf'î*, it is to be observed, that as the impurity of

* The *Jâma* mosque is the principal mosque in a town, where public prayer is read every Friday: in opposition to a *Madjia*, which signifies a smaller mosque, where public prayer is not read.

polytheists

polytheists relates to their *faith* and not to their *externals*, they are not therefore prohibited from entering a mosque; and with respect to menstruous women, they have it in their power to give notice of their case to the *Kázee*, who may then go out and meet them at the gate of the mosque, or depute some other for that purpose, as is done where the case is of a nature unfit for public discussion.

THERE is no impropriety in the *Kázee*'s sitting in his own house or in his own house; to pass judgment; but it is requisite that he give orders for a free access to the people.

IT is requisite that such people sit along with the *Kázee* as were used to sit with him prior to his appointment to the office; because, if he were to sit alone in his house, he would thereby give rise to suspicion. and must be accompanied by his usual associates.

THE *Kázee* must not accept of any presents, excepting from relations allied to him within the prohibited degrees, or those from whom he was used to receive them prior to his appointment; neither of which can be esteemed to be on account of his office, the one being in consequence of relationship, and the other of old acquaintance.—Excepting these, therefore, he must not accept presents from any person, as these would be considered as given to him on account of his office, and such it is unlawful for him to enjoy.—If, also, his relation within the prohibited degrees, having a cause depending before him, should offer him a present, it is incumbent on him to refuse it.—So likewise, if any person accustomed to send him presents prior to his appointment should send him more than usual,—or if, having a suit before him, he should send him any presents whatever; in neither case is it lawful for him to accept them, since they would be considered as given to him in consequence of his office, and hence an abstinence from such is indispensable. He must not accept of any presents, except from relations or intimate friends;

nor of any
feast or enter-
tainment.

THE *Kāzee* must not accept of an invitation to any entertainment, excepting a general one; because a particular entertainment would be supposed to have been given on account of his office, and his acceptance of it would therefore render him liable to suspicion: in opposition to the case of a *general* one.—This ordinance, which has been adopted by the two *Elders*, applies equally to the feasts of relations and others.—It is related, as an opinion of *Mohammed*, that the *Kāzee* may accept of an invitation to a feast from his *relation*, although it be a *particular* one, in the same manner as he is permitted to accept of *presents* from him.—It is to be observed that a *particular* entertainment means such as depends entirely on the presence of the *Kāzee*; that is, such as would not take place in case of his absence; and a *general* one is the reverse.

He must at-
tend funerals,
and visit the
sick.

It is fitting that the *Kāzee* attend at funeral prayers; and also, that he visit the sick; for these are amongst the duties of a *Musfulman*, inasmuch as the prophet, in enumerating six incumbent offices of the *Musfulmans* towards each other, mentioned funeral prayers and the visiting of the sick.—But it is requisite that, on these occasions, he make no unnecessary delay, nor permit any person to hold a conversation on the subject of his suit, lest he should thereby afford room for suspicion.

Precautions
requisite in his
general con-
duct and be-
haviour;

THE *Kāzee* must not give an entertainment to one of the parties in a suit without the other; because the prophet has prohibited this; and also, because it is of a suspicious nature.

WHEN the two parties meet in the assembly of the *Kāzee*, he must behave to both (in regard to making them *sit down*, and the like) with an equal degree of attention; because the prophet has said, “*Let a strict equality be observed towards the parties in a suit with respect to their sitting down, or directing them, or looking towards them.*”

THE *Kazee* must not speak privately to either of the parties, or make signs towards him, to give him instructions or support his argument; for, besides giving rise to suspicion, he would thereby depress the other party, who might be induced to forego his claim, from an opinion that the *Kazee* was biased towards the other.

THE *Kazee* must not smile in the face of one of the parties, because that will give him a confidence above the other; neither must he give too much encouragement to either, as he would thereby destroy the proper awe and respect due to his office.

It is abominable in the *Kazee* to *prompt* or *instruct* a witness, by saying to him, (for instance) “Is not your evidence to this or to that effect?” Because assistance is thereby, in effect, given to one of the parties; and it is therefore abominable, in the same manner, as it would be to instruct either of the parties themselves.—*Abou Toofaf* has said that instruction to a witness, on an occasion free from suspicion, is laudable;—because a witness may sometimes be at a stand from the awe with which he is struck in the assembly of the *Kazee*; and in such case to encourage him, in order to give life to the right of his party, is the same as the deputing of a person to compel the appearance of the defendant in court, which is lawful, notwithstanding it be an assistance to the plaintiff.—As, also, it is lawful to exact bail from the defendant, although an assistance be thereby given to the plaintiff; in the same manner it is lawful to give encouragement to a witness, to preserve his right, although assistance be thereby offered to one of the parties.

and in his conduct towards witnesses in court, or whilst giving evidence.

THE *Kazee* must not give judgment when he is hungry or thirsty, because such situations diminish the intellect and understanding of the person affected by them. Neither must he give judgment when he is in a passion, or when he has filled his stomach with food, because

He must not give judgment at a time when his understanding is not perfectly clear and unbiased.

the prophet has said “ *Let not the magistrate decide between disputants when he is angry or full.*”

A young *Kázee* ought to satisfy his passion with his wife before he sits in the court, that he may not be attracted by the view of women that may be present there.

SECTION.

Of IMPRISONMENT.

Rules in imprisonment for debt.

WHEN a claimant establishes his right before the *Kázee*, and demands of him the imprisonment of his debtor, the *Kázee* must not precipitately comply, but must first order the debtor to render the right; after which, if he should attempt to delay, the *Kázee* may imprison him.—This is related in *Kadooree*; and it proceeds on the principle, that *imprisonment* is the punishment of *delay*;—whence it is necessary first to order him to restore the right to its owner, that his delay may be made apparent.—This is where the right is established by the debtor's acknowledgment; for in that case the non-payment on the first demand is not construed into *delay*, because it is possible that the debtor expects a respite, and therefore has not brought the money along with him. But if he should delay after the decree of the *Kázee*, he must then be imprisoned, as his *delay* is then evident.—Where, on the other hand, the right is established by evidence, the defendant must be imprisoned immediately on the establishment of it; because his denial, which occasioned the necessity of proof by evidence, furnishes a sufficient argument of his intention to delay.

If a defendant, after the decree of the *Káze* against him, delay the payment in a case where the debt due was contracted for some equivalent, (as in the case of goods purchased for a price, or of money, or of goods borrowed on promise of a return,) the *Káze* must immediately imprison him, because the property he received is a proof of his being possessed of wealth.—In the same manner, the *Káze* must imprison a refractory defendant who has undertaken an obligation in virtue of some contract, such as marriage or bail, because his voluntary engagement in an obligation is an argument of his possession of wealth, since no one is supposed to undertake what he is not competent to fulfil.—If, also, in this case, he plead *poverty*, this plea is nevertheless rejected, and the plaintiff's assertion (of his being possessed of wealth) credited.—It is to be observed, that the obligation contracted from *marriage*, as here mentioned, relates only to the *Mibr Moodjal*, or *prompt* dower, and not to the *Mibr Mowjil*, or *deferred* dower, because an engagement to pay a future debt does not argue the possession of wealth.—In cases, also, of debt of any other description, (such as a compensation for *usurped* property, amercement for a crime, the consideration of *Kutábat*, compensation for the freedom of a partnership slave, the maintenance of a wife, and so forth,) the *Káze* must not imprison the defendant when he pleads poverty; because none of these acts indicate the possession of wealth, and therefore his declaration of poverty must be credited.—If, however, the plaintiff prove that he is possessed of wealth, the *Káze* must in that case imprison the debtor, under any of the above circumstances.—The distinctions here stated are from the *Zábir Rawdyet*.—It is said, by other authorities, that the assertion of the plaintiff must be credited in every case of debt; that is, whether the debt be contracted in exchange for an equivalent, or voluntarily engaged for by the party; because poverty is the original state of man, and wealth merely supervenient, and thus the natural condition of man is an argument of the truth of the defendant's declaration of poverty.—There is also another tradition, that the defendant's declaration of poverty

In an award of debt, the defendant must be imprisoned immediately on neglecting to comply with the decree,—provided it be incurred for an equivalent, or by a contract of marriage;

and also in every other instance, if the creditor prove his capacity to discharge it.

is creditable in every case of debt, excepting such as is contracted in exchange for an equivalent.

*Case of a wife
suing for her
maintenance.*

If a wife demand her subsistence from her husband, and he plead poverty, his declaration, corroborated by an oath, is to be credited.—In the same manner, if a person emancipate his share in a partnership slave, and his partner demand a compensation for his share, and he plead poverty, his declaration is to be credited.

OBJECTION.—These two cases are conformable to the two last quoted traditions: but they are repugnant to the doctrine of the *Zābir Rawāyet*; for although, in virtue of the marriage in the one case, and the emancipation of the joint slave in the other, there exists in both a voluntary engagement of responsibility, which indicates the possession of wealth, still his declaration of poverty is nevertheless declared to be creditable.

REPLY.—Subsistence to a wife is not an *absolute* debt, (that is, such as can be rendered void only by payment or exemption,) for it becomes void, according to all our doctors, without payment or exemption, in case of *death*.—In the same manner also, compensation for freedom is not an absolute debt, according to *Haneefa*, being in his opinion the same as the consideration of *Kitābat*;—and the doctrine of the *Zābir Rawāyet* alludes only to *absolute* debts.

—In a case where the defendant pleads poverty, and the plaintiff proves, by evidence, his possession of wealth, the *Kāzee* must imprison him [the defendant] for two or three months; after which it is requisite that he make an investigation into his circumstances; and if, upon such investigation, the people say he is wealthy, let him be continued in confinement:—but if they say he is poor, let him be released; because he stands in need of an allowance of time to enable him to acquire wealth; and the continuance of his imprisonment is, in such case, an oppression.—In *Kadoorie's* abridgement, it is related that he is to be released from confinement, but that the plaintiff is not to be prohibited from using importunity with him.—The case of importunity will be more fully

fully discussed hereafter in treating of *Hijr*.—The period of imprisonment is fixed at *two or three months*, for this reason, that as the imprisonment is inflicted on account of contumacy, in the debtor's withholding payment of the debt, notwithstanding the *Kázee's* order, the *Kázee* must therefore imprison him until such time as he reveal his property, in case he have any concealed; and as it is requisite that the term be of some duration, to the end that this advantage may be obtained from it, *Mohammed* has therefore fixed it at the period above-mentioned.—Other authorities fix it at one month, at five months, and at six months.—In fact, this is a point which must be left to the discretion of the *Kázee*; because the conditions of men are various in regard to their endurance of the hardships of imprisonment, some being capable of bearing it longer than others; and hence the necessity of leaving it to the *Kázee* to act as he may deem best.—If the debtor prove his poverty by witnesses, prior to the expiration of the prescribed period*, in that case there are two traditions. According to one, the witnesses are to be credited: but according to the other their evidence is not to be admitted.—Many of our modern doctors follow the latter opinion.—It is related, in the *Jama Sagbeer*, that if a person make an acknowledgment of debt before the *Kázee*, he [the *Kázee*] must in such case imprison him, and must then make enquiry of the people into his circumstances. If it appear that he is rich, he must in that case continue his imprisonment: but if his poverty be made apparent, he must release him.—The compiler of the *Hedaya* remarks that this alludes to a person who, having at one time made an acknowledgment of debt to the *Kázee*, or to some other, afterwards discovers an intention of delay; for otherwise it would differ from the doctrine of *Kadooree*, before quoted, in which it is expressly declared that the *Kázee* ought not immediately to imprison a debtor after acknowledgment.—

Cases of acknowledgment of debt.

* This is an apparent contradiction to what immediately precedes concerning the discretionary power of the *Kázee* with respect to the period of imprisonment.—It is, however, merely a continuation of the doctrine of *Mohammed*, who has prescribed a term.

(The compiler gives this explanation with a view to reconcile the doctrine of the *Jama Sagbeer* with that of *Kashoorer*.)

A husband may be imprisoned for the maintenance of his wife: but a father cannot be imprisoned at the suit of his son.

A HUSBAND may be imprisoned for the maintenance of his wife, because in withholding it he is guilty of oppression: but a father cannot be imprisoned for a debt due to his son, because imprisonment is a species of severity, which a son has no right to be the cause of inflicting on his father; in the same manner as in cases of retaliation or punishment.—If, however, a father withhold maintenance from an infant son, who has no property of his own, he must be imprisoned; because this tends to preserve the life of the child; and also because there is no other remedy, since *maintenance* (in opposition to *debt*) is annulled by the lapse of time, and therefore it is necessary to prevent its destruction for the future.

CHAP. II.

Of Letters from one *Kázee* to another.

Letters authenticated by evidence are admissible in cases of property.

A LETTER from one *Kázee* to another is admissible relative to all rights except punishment and retaliation, provided it be authenticated by evidence exhibited before the *Kázee* to whom it is addressed, for which there is an absolute necessity, as will be shewn hereafter.

Difference between a *record*, and a *Kázee's* letter.

IF witnesses exhibit evidence, before a *Kázee*, against a defendant, the subject of the suit being at a distance, the *Kázee* may pass a decree upon such testimony, because it establishes proof. The decree so made is written down, and this writing is termed a *Sidjil* or *record*, and is

is not considered as the letter of one *Káze* to another*.—If, however, the evidence be given in the absence of the defendant, the *Káze* must not pass a decree, it being unlawful to do so in the absence of the person whom it affects; but he must take down the evidence in writing, in order that the *Káze* to whom such writing shall be addressed may use it as evidence.—This writing is termed *Kitáb-Hookmee*, or the letter of one *Káze* to another, and is a transcript of real evidence.—It is to be observed that the transmission of letters of one *Káze* to another is restricted to several conditions, which will hereafter be explained; and the legality of it is founded on its necessity, since it may often be impossible for the plaintiff to bring the defendant and the evidences together in the same place, because of the distance of their abodes.—Hence the letter of one *Káze* to another is, as it were, the evidence of evidence, or a branch from the trunk.—It is also to be observed that the term *rights*, above used, comprehends debts, and also marriage dowers, portions of heirs, usurpations, contested deposits, or *Mázáribat* stock denied by the manager; because all these are equivalent to debt, and are capable of ascertainment by description, without the necessity of actual exhibition.—Letters from one *Káze* to another are also admissible in the case of immoveable property, because it is capable of ascertainment by a description of its boundaries:—but they are not admissible with regard to *moveable* property, because, in that case, there is a necessity for actual exhibition.—It is related as an opinion of *Aboo Toosaf*, that letters from one *Káze* to another are admissible with respect to a *male* slave, but not with respect to a *female*, because the probability of elopement is stronger in the one than the other.—It is also related as an opinion of his, that they are admissible with respect to both male and female slaves, but that particular conditions are requisite to esta-

A letter is transmissible only on certain conditions.

* This case supposes the thing in dispute to be situated in the jurisdiction of a different *Káze* from him before whom the parties bring their suit; and the decree which in this case the *Káze* gives being written down, is carried to the other *Káze*, who is bound to see it enforced.

blish their admissibility, which will be explained in their proper place.—It is related as an opinion of *Mohammed*, that the letters of a *Kāzee* are admissible with respect to every species of moveable property; and this opinion has been adopted by our modern doctors.

The testimony
requires to
authenticate
it.

THE letters of *Kāzees* are not admissible, unless authenticated by the testimony of two men, or of one man and two women; because there is a similarity between all letters, and it is therefore necessary to establish their authenticity by complete proof,—that is by evidence.—The grounds of this is, that these letters are binding in their nature, and therefore require to be completely proved.—It is otherwise with respect to the letters of *Hirbees* [Infidel aliens] to the *Imām*, soliciting protection; for these require not to be proved by evidence, since they not binding in their nature, inasmuch as it rests with the *Imām* to grant the protection or not at his pleasure.—It is also otherwise with respect to the message of a *Kāzee* to a *Moozkee* [purgator of witnesses,] or with respect to the message of a purgator to the *Kāzee*, for such a message has no force, considered as the message of a purgator, but merely as being a corroboration of the testimony of witnesses.

The contents
must be pre-
viously ex-
plained to the
authentica-
ting witnesses.

IT is incumbent on the *Kāzee* to read his letter in the presence of the witnesses who are to authenticate it, or to explain the contents of it to them, that they may have a knowledge thereof; because evidence cannot be given without knowledge. Afterwards he must close the letter, and affix his seal to it in their presence, and then consign it over to them, that they may have a security against any possibility of alteration in it.—This is according to *Haneefa* and *Mohammed*; and the reason is, that a knowledge of the subject of the letter, and an evidence of the affixture of the seal, are indispensable requisites; and in the same manner a remembrance of the contents is also requisite; whence it is that the *Kāzee* must furnish them with an open copy of the letter, with which they may refresh their memory.—It is however related, as the last opinion of *Aboo Yoosaf*, that no one of these

particulars is requisite, it being sufficient to attest that this is the letter and this the seal of the *Káze*; and it is also reported, from him, that the affixture of the seal is not necessary.—Hence it appears that, after his attaining the dignity of *Káze*, he considered this matter as of little consequence; and his opinion is of great weight, since those that only *bear* are not so competent to determine as those that *see*.—*Shimsal-Ayma* has adopted the opinion of *Aboo Yoosaf*.

WHEN a letter from a *Káze* arrives, the *Káze* to whom it is addressed ought not to receive it unless in the presence of the defendant; because as such letter is equivalent to an exhibition of evidence, the presence of the defendant is therefore indispensable.—It is otherwise with respect to the other *Káze*'s hearing the evidence, because that is done merely with a view to *transmit* it, and not to *pass sentence* upon it.

It must not be received but in presence of the defendant.

WHEN the witnesses bring the letter to the *Káze* to whom it is addressed, let him first look at the seal of it, and after hearing their testimony, (that “this is the letter of a particular *Káze*,”—that “he delivered it to them in his court of judgment,”—that “he read it in their presence,”—and, that “he affixed his seal to it before them,”) let him then open and read it in the presence of the defendant, and pass a decree agreeably to the contents.—This is according to *Haneefa* and *Mohammed*.—*Aboo Yoosaf* has said it is sufficient for the witnesses to attest that “this is the letter and seal of such a *Káze*.”—In the *Kadooree*, the proof of the integrity of the witnesses prior to the opening of the letter is not made a condition.—The better opinion, however, is that it is a necessary condition; and the same has been declared by *Khasf*; for this reason, that there may eventually be a necessity to recur to other evidence, in case of a want of proof of the integrity of those that brought it; and it would be impossible for any others to give their testimony unless the seal still remained upon it: it is therefore absolutely necessary that the *Káze* defer

Forms to be observed in the reception of it.

defer breaking the seal of the letter until the integrity of the bearers be proved.

It is rendered void by the death or dismissal of the writer in the interim;

or (unless generally addressed) by the death or dismissal of him to whom it is transmitted.

ONE *Kázee* must not accept a letter from another, unless the *Kázee* that wrote it be, at the time, still fixed and established in his office.—If, therefore, prior to the receipt of the letter, the *Kázee* that wrote it should have died, or have been dismissed from his office, or have become disqualified from the duties of it, from apostacy or insanity, or from having suffered punishment for slander,—the *Kázee* to whom the letter is addressed must then reject it; because the author of it being at that period reduced to the level of the people, any information from him, independent of what relates to himself, or mutually to them both, is not admissible.—So likewise, if the *Kázee* to whom the letter is addressed should have died, another *Kázee* must not open it, unless the address run in this manner, “To the son of — *Kázee* of the “city of — or to whatever *Kázee* it may concern, this letter,”—in which case another *Kázee* may receive it, because he is comprehended in the address from the specification of his office and city.—If the address, however, be merely, “To whatever *Kázee* it may concern,” he is not entitled to open it, from the uncertainty of the address.

IF the defendant die previous to the arrival of the letter with the *Kázee*, judgment must be passed upon it in presence of his heir, as being his representative.

It is not admissible in cases of punishment or retaliation.

A LETTER from one *Kázee* to another is not valid in cases of retaliation or punishment; because as in such a letter there exists a semblance of substitution, (for the letter is not itself evidence, but merely a *substitute* for evidence,) it is therefore equivalent to evidence upon evidence; and as evidence upon evidence is not admitted in these cases, the letter of a *Kázee* cannot be admitted.

SECTION.

A WOMAN may execute the duties of a *Kázee* in every case except punishment or retaliation, in conformity with the rule that the evidence of a woman is admissible in every case except in cases of punishment or retaliation; for the rules of jurisdiction are derived from the rules of evidence, as was before stated.

A woman may execute the office of *Kázee* in all cases of property.

IT is not permitted to a *Kázee* to appoint a deputy, unless he have received a special power from the *Imám* to that effect; for although he have been himself appointed to the office of *Kázee*, yet he has not been empowered to confer such appointment on another.—Hence, in the same manner as it is unlawful for an agent to appoint an agent unless with the permission of his constituent, so is it unlawful for a *Kázee* to appoint a deputy unless by the authority of the *Imám*.—It is otherwise with respect to a person appointed to read the Friday's prayers; for he may appoint a deputy to act for him, since if any delay should happen in the performance of this service, the prayers would become void and null, as the period for them is fixed: the appointment of a person to read these prayers, therefore, is virtually an argument of his being empowered to appoint a deputy to act for him, with a view to prevent the nullity of the service:—contrary to *jurisdiction*, which not depending on a fixed period, is not therefore defeated by delay.

A *Kázee* is not at liberty to appoint a deputy, without the authority of the *Imám*:

IF a *Kázee*, not having power to appoint a deputy, should nevertheless appoint one, and the said deputy, either in presence of the *Kázee*, or in his absence but with his approbation, pass a decree; the decree so passed is valid;—in the same manner as where the agent of an agent performs any act in the presence of the agent, or with his consent, in which case such act is valid.—The ground of this is that the de-

but the decrees of the deputy, passed in his presence or with his approbation, are valid.

cree being passed in the presence of the *Kázee*, or with his approbation, and the act being performed in the presence of the agent, or with his approbation, the judgment and reflection of the *Kázee* himself is therefore exercised in the case of the decree passed by his deputy,—and the judgment and reflection of the agent in the case of the deed done by his agent,—which is what was required.

If he appoint a deputy, by authority, he cannot afterwards dismiss him.

If the *Imám* give authority to the *Kázee* to appoint whomsoever he pleased his agent, the person whom he appoints becomes in that case the deputy of the Sultan; and the *Kázee* is not entitled to dismiss him.

He must maintain and enforce the equal decrees of every other *Kázee*.

It is incumbent upon every *Kázee* to maintain and enforce the decree of another *Kázee*, unless such decree be repugnant to the doctrine of the *Koran*, or of the *Sonna*, or of the opinions of our doctors; in other words, unless it be a decision unsupported by authority.—It is related, in the *Jama Sagheer*, that if a *Kázee* pass a decree in a matter concerning which different opinions have been given, and be afterwards succeeded by another *Kázee* of a different opinion with respect to that matter, the latter *Kázee* must nevertheless enforce the decree so made; for it is a rule that when a *Kázee* passes a decree in a doubtful case, the decree is executed accordingly; nor is it permitted to a succeeding *Kázee* to rescind it, because although the succeeding *Kázee* be equal in point of judgment to his predecessor, still the judgment of the predecessor is in this instance allowed a superiority, because of its having been exercised in passing the decree; and therefore it cannot be affected by the judgment of his successor, which is deemed inferior from its not having been exercised.

His determination in a doubtful case is valid, although it be repugnant to

If a *Kázee*, in a doubtful case, determine contrary to his tenets, from having forgotten the principles of his sect, such decree must nevertheless be enforced, according to *Haneefa*.—if, on the contrary, he pass such decree knowingly, and not through forgetfulness, there are

in

in that case two opinions recorded.—According to one, the decree must be enforced in *that* instance also, because the error in it is uncertain.—In the opinion of the two disciples the decree must not be enforced in either case; that is, whether the error be wilful, or proceed from forgetfulness: and this is the approved exposition.—By a *doubtful* case is meant one in regard to which there is no particular ordinance, either by the word of God, or by the prophet, and concerning which, consequently, different opinions have been supported by the companions and their followers.—Where a *great number*, however, have concurred, and only a *few* have differed, it is not considered as a *doubtful* case.

the tenets of his sect.

EVERY thing of which the illegality is decreed by the *Kāzee* from apparent circumstances, that is to say, from the testimony of witnesses, although in reality such testimony be false, is nevertheless *ipso facto* unlawful.—* This is according to *Haneefa*: and he is also of the same opinion where the *Kāzee* decrees the *legality* of a thing; provided, however, that the claim of the plaintiff be founded on some determinate plea, such as *purchase*, *lease*, or *marriage*,—as if, for instance, he should claim a female slave by asserting that he had *purchased* her.

An article decreed unlawful, upon evidence, continues so, although the evidence prove false.

THE *Kāzee* must not pass a decree against an absentee unless in the presence of his representative.—*Shaf'ii* maintains that it is lawful for a *Kāzee* to pass a decree against an absentee; because, upon the establishment of proof by testimony, the right in the judgment of the *Kāzee* becomes evident.—The arguments of our doctors upon this point are twofold.—FIRST, the passing of a decree on the testimony of witnesses is with a view to put an end to contention; and as conten-

A decree cannot be passed against an absentee but in presence of his representative:

* For instance, if two people declare that there is a drop of wine in a particular vessel of water, and the *Kāzee* in consequence decree it to be unlawful, it must be considered as such, although the falsity of their declaration be afterwards proved.

tion supposes a refusal on the part of the defendant, it follows that as his absence precludes the possibility of his refusal, no contention can have existed. SECONDLY, the absence of the defendant admits of two suppositions, namely, that (if present) he would either have *acknowledged* the claim, or *denied* it: if the *former*, the *Kázee* must have passed a decree upon that ground; or, if the *latter*, upon testimony. Now decrees passed on those different grounds are of a distinct nature, since that which is founded on testimony is binding on all men, whereas the other is not.—Where, therefore, the defendant is absent, it becomes a matter of doubt with the *Kázee* what kind of decree he ought to pass; and hence it is requisite that he suspend it until the arrival of the defendant, when the nature of the decree he ought to pass will be ascertained.

nor against
one who first
opposes the
claim and
then disap-
pears.

IF a defendant, having first denied the claim, should afterwards disappear, in that case also the *Kázee* must suspend his proceedings during his absence, because it is requisite that the denial exist *at the time of passing the decree*, which is not the case in the present instance.—The opinion of *Abou Yoosuf*, on this case, is different.—It is to be observed that the *representative* of an absentee is either one appointed by himself to act for him, (such as an *agent*,) or one appointed by LAW, (such as an executor nominated by the *Kázee*,) or, lastly, one who stands as *virtual* representative, by the claim which the plaintiff prefers against the absentee being also a cause of claim against some person present. This last may occur in various modes; and the following may serve for an example.—A person establishes, by testimony, his right to a house in the possession of a particular person, in virtue of his having purchased it from an absentee, who was at that time the proprietor of it, and from whom the present possessor has usurped it;—in which case, if the possessor deny all this, and the plaintiff establish it by evidence, the *Kázee* may pass a decree relating both to the absentee and the person present; nor would the denial of the sale by the absentee, if he should afterwards return, be credited,

credited, because the purchase of the house from its proprietor is the cause of that which the plaintiff claims from the person present, namely, the right of property in the house. In such case, therefore, the person present stands as the agent for the absentee, and his denial is consequently equivalent to that of the absentee.—The ground of this is that the plaintiff is not capable of proving his claim against the person present, unless he first establish it against the absentee. The person present is therefore considered as the representative of the absentee; and hence the decree of the *Kazee* against the person present stands as a decree against the absentee.—Where, however, the claim of the plaintiff upon the absentee is the condition of something which he claims against the person present, the latter is not in that case considered as the representative of the absentee. A full discussion of this is to be found in the *Jama*.

It is lawful for a *Kazee* to lend the property of orphans, keeping a record of it in writing; because such loan is advantageous for the orphans, since it tends to preserve and secure their property; and the *Kazee* has the power of enforcing the restitution of it.—An *executor*, on the contrary, is responsible for the property he lends, as is also a *father*, because neither of them has the power of enforcing a restitution of it.

The *Kazee*
may lend the
property of
orphans.

C H A P. III.

Of Arbitration*.

IF two persons appoint an arbitrator†, and express their satisfaction with the award pronounced by him, such award is valid; because, as these persons have a power with respect to themselves, they consequently possess a right to appoint an arbitrator between them, and his award is therefore binding upon them.—This is where the person so appointed possesses the qualifications of a *Kázee*; for as he stands in that relation to the other two, it is therefore requisite that he be competent to discharge the function of a *Kázee*.

An arbitrator must possess the qualities essential to a *Kázee*.

He must not be a *slave*, an *infidel*, a *flanderer*, or an *infant*:

IT is not lawful to appoint a slave, or an infidel, or a person that has been punished for slander, or an infant, to act as an arbitrator; because none of these is competent to be a witness.

but he may be an *unjust* person.

IF an unjust man be appointed an arbitrator, it is valid, because of the validity of his appointment to the office of *Kázee*, as has been already explained.

Either party may retract from the arbitration before the award.

IF two men appoint another an arbitrator, still it is lawful for either of them to recede before he gives his award, because as the arbitrator has received his powers from them, he cannot exert those powers without their consent. The award, however, when given, is binding upon them, as the power of the arbitrator over them was established by their own agreement.

* Arab. *Tabkhem*.

† Arab. *Hakem*.

IF the parties refer the award of the arbitrator to the *Káze*, and it be conformable to his opinion, he must cause it to be carried into execution, because it would be useless to annul it, and then pass a similar decree.—But if it be contrary to his opinion, he must annul it, as the award of an arbitrator is not binding on the *Káze*, since he did not authorize it.

On a reference to the *Káze*, he must give effect to the award, if approved.

THE appointment of an arbitrator is not valid in cases where punishment or retaliation is incurred; because the party has no power over his own blood, and is therefore not capable of assigning it to others. Lawyers have observed that the particular exception of retaliation and punishment affords an argument of the legality of arbitration in all other contested questions, such as divorce, marriage, and the like. This is approved. Still, however, there is a necessity for a ratification of the award in these cases by a decree of the *Káze*, in order that a controul being maintained over mankind, their presumption may be restrained, for otherwise men would continually settle their differences by a private reference, without regard to the LAW.

Reference to an arbitrator is invalid in cases of punishment or retaliation.

IF, in a case of homicide from error, the slayer and the heir of the deceased appoint an arbitrator, and he award a fine of blood to be paid by the tribe of the slayer, such award is of no effect; in other words, the heir is not entitled to exact such fine from the tribe in virtue of the award, for it has no force over them, as they did not authorize the arbitrator.—If, also, the arbitrator award the fine to be paid by the *slayer*, the *Káze* must annul it, as being contrary to the LAW, which prescribes the fine to be paid by the tribe;—excepting, however, where the fact is proved by the confession of the slayer; for in that case the tribe are not liable to the fine.

An arbitrator's award of a fine against the tribe of an offender is of no effect:

nor against the offender himself; unless he acknowledge the offence.

An arbitrator is empowered to hear the witnesses of the plaintiff,
8 and

He may examine witnesses.

and also to pass an award upon the denial or acknowledgment of the parties, because this is agreeable to the LAW.

The parties, acknowledging an arbitrator's decree, cannot afterwards retract from it.

IF an arbitrator give information to the *Kázee* of the acknowledgment of one of the parties, or of the integrity of the witnesses, at a time when both the parties continue to adhere to his award, such information must be credited, and the *Kázee* must not afterwards credit the denial of either of the parties, as the arbitrator's authority still continues unshaken.—If, on the other hand, he give information to the *Kázee* relative to his *award*,—(that is, if the parties dispute concerning his award,—one of them saying that “it was to *such* or *such* effect,” and the other denying this, and the arbitrator inform the *Kázee* that “he has awarded *so* and *so*,”)—his information must not be credited, since in such case his authority no longer endures.

Any award passed in favour of a parent, child, or wife, is null.

THE determination of every person acting in the capacity of a judge (whether he be a *Kázee* or an *arbitrator*) in favour of his father, his mother, his child, or his wife, is null and void, because evidence in favour of any of these relations being unlawful on account of the suspicion which it suggests, a determination in their favour is also unlawful, for the same reason.—A determination, however, *against* any of these relations is valid, because evidence against them is accepted, since it is liable to no suspicion.

Joint arbitrators must act conjunctively.

IF two persons be appointed arbitrators, it is incumbent upon them to act conjunctively in giving a determination, as this is a matter which requires wisdom and judgment.

SECTION.

MISCELLANEOUS CASES *relative to* JUDICIAL DECISIONS.

IN a house, of which the upper story belongs to one man, and the under story to another, the proprietor of the under story is not entitled to drive in a nail, or to make a window, without the permission of the proprietor of the upper story.—This is the doctrine of *Haneefa*. The two disciples hold that the proprietor of the under story may do any act whatever with respect to it, provided no injury result to the upper story. The same disagreement also subsists with regard to the proprietor of the upper story building upon that foundation. Some of our lawyers remark that the doctrine ascribed to the two disciples is only an explanation of that of *Haneefa*, and that, in reality, there exists no disagreement between them.—Others again say that, according to the two disciples, there is a perfect freedom;—in other words, either of the proprietors is at full liberty to do whatever act he pleases with relation to his property; for *property*, in its very nature, implies a perfect freedom with regard to it, restrictions upon it being merely supervenient, and fixed in order to prevent any detriment to another. Hence if the detriment be only *doubtful*, and not *inevitable*, the proprietor cannot lawfully be restrained from acting upon his own property. According to *Haneefa*, on the other hand, there is a restriction;—in other words, neither of the proprietors is permitted to do any acts with regard to their respective property without the permission of the other, because such acts affect a place with which the right of another is connected, and that right is sacred from any act of his, in the same manner as the right of a mortgager or a lessee.—Besides, the freedom and absoluteness of the property to its owner is here supervenient, since it depends on the consent of another: so long,

No act can be performed, with respect to the under story of a house, which may any way affect the building.

therefore, as that consent is doubtful, the original restriction operates. In these cases, moreover, the detriment is not *eventual*, but is in some degree *certain*; since the driving in of a nail or wedge, or the breaking of the wall to make a window, tends to weaken the edifice, whence these acts are prohibited.

A passage
cannot be
made into a
private lanc.

IF there be a long lane, parallel to which, either on the right or left, runs another long lane, not a thoroughfare, (that is, not open at both ends,) it is not permitted to any of the inhabitants of the first lane to make a door to open into the second lane; because the object of making a door is to obtain a passage to and fro; and the second lane is not free to the inhabitants of the first, since not being a thoroughfare, the right of passage through it belongs only to the inhabitants of it.—Some have said that it is perfectly lawful for any of the inhabitants of the first lane to open a door into the second; because the opening of a door is nothing more than the breaking of a wall by its proprietor, which is lawful; but that the prohibition against passing to and fro nevertheless remains in force. The authentic doctrine however is, that the opening of a door, in such case, is unlawful; because after the door is opened it will be difficult to prevent a continual thoroughfare; and also, because there is a possibility that after some time the right of passage might be claimed by the person who made the door, and the very circumstance of the door might be pleaded as a proof of his right. If, however, the second lane be not *long*, but *short*, the inhabitants of the first lane have a right to open doors into it; because they have a right of passage through it, since on account of its shortness it is considered as a *court*, in which all have a right of participating, whence it is that they have all an equal claim of *Sbaffa* in case of the sale of any of the houses in it.

An indefinite
claim may be
compounded.

IF a person vaguely claim something belonging to a house, and the proprietor of the house deny his right to any thing, but after-

wards

wards compound with him for his claim, such composition is valid; for although the article in dispute was not known, yet a composition with a *known* article for one that is *unknown* is lawful, according to our doctors, since as the article compounded for merely *drops*, the uncertainty concerning it can never create strife;—for uncertainty, in a matter which *drops*, leaves no room for contention, as this cannot occur but in cases of uncertainty respecting things the delivery of which is required.

If a person claim a house in the possession of another, on the plea that “the possessor had, at a former period, made a *gift* of it to him,” and upon being required to produce evidence, should then say “he “denied the gift, and I therefore bought the house from him,” and produce witnesses, and they attest the purchase, but state the date of it to be antecedent to the gift, such testimony is not admissible, because of its differing from the assertion of the claimant with respect to the date of the deeds;—whereas, if they were to attest the purchase as having been made *posterior* to the gift, their testimony would in that case be admitted, because of its conformity to the claimant’s plea. If, on the other hand, he plead a gift, and then bring witnesses to prove the purchase previous to the gift, without mentioning the denial of the gift by the donor, in this instance also the evidence is not admissible.—This is mentioned in various copies of the *Jama Sagbeer*; and the reason of it is that the claim of the house, in virtue of a gift, is an acknowledgment of its being the property of the giver; but from which the claimant afterwards recedes by declaring that he had purchased it prior to the gift, which is a contradiction.—It is otherwise in the former case; for there the purchase is declared to be *posterior* to the gift; and a declaration to this effect, so far from *denying* the property to have existed in the donor at the time of the gift, is rather a *confirmation* of it.

Case of a
claim found-
ed on gift
and purchase.

If the purchaser of a female slave be denied by the purchaser, the master may cohabit with her.

If a person possessed of a female slave say to another “you purchased this slave from me, and have not paid me the price,” and the other deny the sale, and the possessor of the slave determine in his own mind to drop the suit, and of consequence refrain from any further contention with the other, he may then lawfully cohabit with her, since the denial of the purchaser annuls the sale in the same manner as where both parties deny it.

OBJECTION.—How can the sale be annulled by the mere determination of the seller in his own mind to relinquish the suit, since no contracts can be annulled by the mere determination to annul them; whence it is that, in a sale with an option, if the possessor of the option determine to annul it, still the annulment does not take place immediately on the forming of such resolution?

REPLY.—In the case in question the sale does not become null merely by the determination, but because of the determination being joined to a conduct that manifests it, such as the detention of the slave in the proprietor's possession, his carrying her away from the place of contention to his own house, and his using her as a servant.

In the receipt of money, the declaration of the receiver must be credited with respect to the quality.

If a person acknowledge that he had received ten *dirms* from another, but afterwards assert that they were *Zeyf*, or *bad*, in that case his declaration must be credited; because *bad dirms*, although of an inferior value, are nevertheless of the species of *dirms*, whence if, in a *Sirf* sale, a person take possession of *bad* ones in exchange for *good*, it is valid. As, moreover, a receipt of *dirms* is not restricted to *good* ones, it does not follow, from his acknowledgment of the seizure, that the *dirms* were good; and such being the case, his declaration must be credited, because he denies the receipt of good *dirms*, which is his right.—It would be otherwise if he were to declare that “he had received ten *good dirms*,” or that “he had received his *right*,” or “the price of his wares,” or “a discharge of his claims,” and afterwards to allege that the *dirms* were *bad*; for in neither of these cases

cases would his declaration be credited; because in the first case he expressly acknowledges the receipt of good *dirms*; and in the three following he makes such acknowledgment by implication, and therefore his subsequent declaration to the contrary, being considered as a prevarication, is not credited *.

If one person say to another "I owe you one thousand *dirms*," and the other reply "you do not owe me any thing," but afterwards, in the same meeting, say "you owe me one thousand *dirms*," in that case he is not entitled to any thing unless he adduce proof, or the debtor verify his assertion; because the debtor's acknowledgment was virtually annulled by his denial; and his subsequent assertion of course becomes a claim *de novo*, which therefore requires either to be proved, or to be verified by the debtor. It is otherwise where a person says to another "you bought certain goods from me," and that other denies; for he might nevertheless afterwards, without prevarication, confirm the declaration of the person in question in the same meeting; because in a contract of sale one of the parties only cannot annul it; in the same manner as one of them is incapable of making it.—The reason of this is that the acknowledgment of a contract of sale is the right of the buyer and seller jointly, and therefore the contract is not annulled by the denial of the purchaser only: the confirmation of the purchaser, therefore, after his denial, is valid, since his denial did not occasion an annulment.—A person, on the contrary, in whose favour an acknowledgment is made, may of himself annul such acknowledgment by a rejection of it; and his subsequent assertion corresponding with the acknowledgment is not a corroboration of it, because the acknowledgment did not then exist, it having been virtually done away by his rejection of it.—Hence the sub-

A creditor denying his debtor's acknowledgment cannot afterwards substantiate his claim but by proof, or the debtor's verification.

* Here follows an account of the different gradations of *dirms* from good to bad, which is omitted in the translation, as it will hereafter be fully explained in its proper place.

sequent assertion is a claim *de novo*, which consequently requires either proof by witnesses, or the verification of the debtor.

In a claim for debt, the evidence of the debtor, proving a discharge, must be credited.

If a person make a claim upon another, and that other declare that he never owed him any thing, and the plaintiff prove, by witnesses, that the defendant owes him one thousand *dinms*, and the defendant, on the other hand, prove by witnesses that he has paid the same, in that case the evidence of the defendant must be credited: and in the same manner also, the evidence of the defendant must be credited, in case it tend to establish his having obtained a release or discharge of the claim.—*Ziffer* maintains that the evidence of the defendant must not be credited, since payment is a branch of obligation, and the defendant having denied the existence of the obligation at any period, is therefore evidently guilty of prevarication. Our doctors, on the other hand, argue that a consistency with regard to the denial and the proof is here possible, because unjust debts are sometimes paid to avoid litigation, and release from them are likewise sometimes given. Sometimes, also, a defendant, after denying the validity of the claim, compounds with the plaintiff; and in such case he is bound to pay the composition, notwithstanding the debt for which it was made may have been unjust.—If the defendant declare, “I owe you *nothing*,” in that case also his evidence, to the effect above recited, is creditable, because of its perfect conformity with the assertion that “he owes him *nothing*,” which evidently means *at that time*, in as much as he proves that he had afterwards paid it to him.—But if he were to say “I never owed you any thing, and I do not “know you,”—the evidence he might afterwards produce of his having paid the debt, or of his having obtained a release from it, would not be credited; because the contradiction between his assertion and the evidence cannot in this case be reconciled, since no man enters into the business of giving or receiving with one of whom he has no knowledge.—*Kadoorce* remarks that in this case also the evidence must be credited, because the contradiction that subsists is not wholly

wholly irreconcilable, in as much as women who are kept concealed often transact business mediately through others, without knowing the person with whom the business is concluded; and it also often happens that men of rank, when a mob assemble at their door and make a noise, desire their agents to give them some money to pacify them.

If a person declare that "he has purchased a female slave from another," and that other deny that he had ever sold her to him, and the purchaser having proved his assertion by witnesses, an additional finger be discovered on the hand of the slave, and the seller prove by evidence that the purchaser had exempted him from responsibility for every defect, in that case the testimony of the seller must be rejected, since he is evidently guilty of prevarication. This is the doctrine of the *Zâbir Rawdyet*. It is related, as an opinion of *Aboo Yoofoof*, that the evidence of the seller must be credited, because of the analogy of this case to that of debt, as before explained, in which it was shewn that there was a possibility of reconciling the contradiction; for a reconciliation of the contradiction is also possible in this case, by supposing the seller to have been an agent for another, on which supposition the declaration of the proprietor, that "he had not sold the slave," would have been true, and his subsequent plea, of having been exempted from a responsibility for defects, would also have been valid. Thus the apparent contradiction is capable of reconciliation. The ground on which the *Zâbir Rawdyet* proceeds is, that the plea of having been exempted from a warranty against defects is an acknowledgment of the existence of the sale, which he had before denied, and hence it necessarily follows that he prevaricated.—It is otherwise in the case of debt, for in that case the payment is no argument of the respondent's acknowledging the existence of it, since (as has been before explained) unjust debts are often paid to avoid strife.

Case of a disputed purchase of a defective slave.

A deed suspended, in its effect, upon the will of God, is null.

If a person, having acknowledged a debt to another, should subscribe a deed to that effect, and at the conclusion of it insert the following sentence, "Whosoever produces this deed of acknowledgment, and claims the thing recited therein, is proprietor thereof, if it please God,"—or, if a person, having sold something to another, should at the end of the bill of sale insert the following sentence, "If any person shall hereafter claim the property of the subject of the sale, in that case I am answerable for the same, if it please God,"—in both these cases the deeds are of no effect; whence, in the first case, the acknowledgment is null, and in the second, the sale is invalid. The two disciples hold that in the former case the debt is binding, and in the latter case the sale is valid; because in their opinion the condition "if it please God" applies, not to the general purport of the deed, but merely (in the former instance) to the expression "Whoever produces this deed of acknowledgment," and so forth,—or (in the latter) to the expression "If any person shall hereafter claim," and so forth; because the design, in drawing up deeds of acknowledgment and of sale is merely to corroborate and confirm the act; and if the expression in question had a reference to the whole deed, this design would be defeated. *Haneefa*, on the contrary, being of opinion that this condition applies to the whole of the deed, therefore holds it to be invalid*.—It is to be observed that if a blank be left at the end of a bill of sale or deed of acknowledgment, and the words "*if it please God*" be afterwards written, our lawyers are of opinion that the clause does not affect the bill or the deed, because the blank, in either case, marks the conclusion.

* The arguments both of the two disciples and of *Haneefa* are more fully detailed in the original; but as they relate to principles proper to the *Arabic* language, the translator has given only the *substance* of them.

CHAP. IV.

Of the Decrees of a *Káze* relative to Inheritance.

IF a christian die, and his widow appear before the *Káze* as a *Mus-
sumá*, and declare that “ she had become so *since* the death of her
husband,” and the heirs declare that she had become so *before* his
death, their declaration must be credited. *Ziffer* is of opinion that
the declaration of the widow must be credited; because the change of
her religion, as being a *superveniens* circumstance, must be referred to
the nearest possible period. The arguments of our doctors are, that as
the *cause* of her exclusion from inheritance, founded on difference of
faith, exists in the present, it must therefore be considered as extant
in the preterite, from the argument of the present;—in the same man-
ner as an argument is derived from the present, in a case relative to
the running of the water course of a mill;—that is to say, if a dispute
arise between the lessor and lessee of a water-mill, the former asserting
that the stream had run from the period of the lease till the present
without interruption, and the latter denying this, in that case, if the
stream be running at the period of contention, the assertion of the
lessor must be credited, but if otherwise, that of the *lessee*. As,
moreover, an argument drawn from apparent circumstances is proof
sufficient to set aside the claim of a plaintiff, it follows that the ar-
gument in question suffices, on behalf of the heirs, to defeat the plea
of the widow.—With respect to what *Ziffer* objects, it is to be ob-
served that he has regard to the argument of apparent circumstances,
for establishing the claim of the wife upon her husband’s estate, and

Case of the
widow of a
Christian
claiming her
inheritance
after having
embraced the
faith.

an argument of this nature does not suffice as proof to *establish* a right although it would suffice to *annul* one.

Case of the Christian widow of a Mussulman claiming, under the same circumstance.

If a *Mussulman*, whose wife was once a Christian, should die, and the widow appear before the *Kâzee* as a *Muslimâ*, and declare that she had embraced the faith *prior* to the death of her husband, and the heirs assert the contrary,—in this case also the assertion of the heirs must be credited, for no regard is paid, in this instance, to any argument derived from present circumstances, (as in the case of the water-mill,) since such an argument is not capable of establishing a claim, and the widow is here the claimant of her husband's property. With respect to the heirs, on the contrary, they are repellants of the claim; and probability is an argument in their favour, since the *Islamism* of the widow is supervenient, and is therefore an argument against her.

A trustee, on the decease of his principal, must pay the deposit to whomsoever he acknowledges as heir.

If a person who had deposited four thousand *dîrims* in the hands of another should die, and the trustee acknowledge a certain person to be the son of the deceased, and his true and only heir, he is bound to pay to that person the four thousand *dîrims* which he held in trust; because in this case he makes an acknowledgment that what he retains in trust is the right of the heir, and consequently it is the same as if, during the life of the person from whom he received the deposit, he had acknowledged that it was his right. It is otherwise where a trustee makes an acknowledgment that a certain person has been appointed an *agent for seizure* by the proprietor, or that such an one has *purchased* the deposit from the proprietor; for in that case he could not be desired to deliver up the deposit, because this acknowledgment proves the actual existence of the depositor, since it shews him to be still living. His acknowledgment, therefore, of the agency or the purchase, is an acknowledgment affecting the property of another: but this cannot be objected to an acknowledgment made by a trustee after the death of the proprietor, for upon that event the property devolves upon the heirs.—

It is otherwise where a debtor acknowledges that a certain person has been appointed agent for seizure by his creditor; for the acknowledgment here relates to his own property, in as much as he pays the debt by means of his own property, and the agent receives the same; and hence, after such acknowledgment, he becomes bound to pay it.—If the trustee, after making an acknowledgment in favour of the son and heir, in the manner above related, should again make an acknowledgment in favour of another son, and the one first acknowledged deny the same, in that case he [the trustee] is bound to pay the whole to that one; because after such acknowledgment became binding (in the manner already explained) his tenure of the property was no longer valid; and hence his subsequent acknowledgment in favour of the other son is an acknowledgment with respect to the absolute property of the first son, and is consequently invalid,—in the same manner as holds where the first son is notorious;—and also, because, as at the time when he [the trustee] made the acknowledgment in favour of the first son, no other son appeared to assert his right, the acknowledgment was therefore valid; but as the first son is present to deny the acknowledgment afterwards made in favour of the second son, that acknowledgment is therefore invalid.

WHEN a division is made of the effects of a deceased person between his heirs and creditors, the *Kázee* must not require security either from the heirs or the creditors, as a precaution in case of the appearance of more heirs or more creditors, for this would be oppression, as being a deviation from common practice. This is according to *Hancefa*. The two disciples maintain that he must require security.—This disagreement relates to a case where the debt of the creditors and the right of inheritance is proved by evidence, and where they severally declare that they know of no other debtors or heirs than themselves.—The reasoning adduced by the two disciples in support of their opinion is, that the *Kázee* is the conservator of the rights of the absent; and it is most probable that some of the creditors

In the division of an estate, the *Kázee* must not demand any security from the heirs or creditors in behalf of those who may be absent.

or heirs may be absent, since death is often sudden, and may happen at a time when they are not all present; and as the taking of security is on this account an adviseable precaution, the *Kázee* must therefore take this precaution, in the same manner as he exacts security when he delivers a trove, or a fugitive slave, to the owner, or when he awards maintenance to a wife from the estate of her absent husband. The arguments of *Haneefa* upon this point are twofold.—FIRST, the right of those that are present is established with certainty in case of there being no absent heirs, and is *apparently* established in the mean time, even if there be absent heirs; and as it is incumbent on the *Kázee* to act according to what is *apparent* to him, he must not suspend his proceedings in favour of those that are present, by exacting security for the rights of the absent, whose actual existence is uncertain;—in the same manner as where a person establishes the *purchase* of any thing in the hands of another,—or a debt due to him by a slave; that is, if a person prove a right by purchase to a thing in the possession of another, it is the duty of the *Kázee* immediately to order it to be delivered to him without exacting security, although another may eventually appear and claim it in virtue of a prior purchase;—and in the same manner, if a person prove a debt due to him by a slave, the *Kázee* must order the slave to be sold, to the end that payment may be made from the price, without exacting any security, although there be a possibility of another creditor afterwards appearing.—SECONDLY, the principal is unknown, and security is invalid if the principal be not clearly pointed out,—as where, for instance, a person says to several debtors “I am bail for *one* of you,” in which case the security is invalid, because the actual principal is not signified, notwithstanding there be a certainty of his existence. In the case in question, therefore, the security is invalid *a fortiori*, since even the *existence* of the principal is uncertain.—It is otherwise in the case of decreeing maintenance to the wife of an absentee from the effects of her husband, because her right being known and established, the person in favour of whom the security is given is not uncertain.—With respect

spect to the case of a fugitive slave, or a trove property, there are two traditions.—Concerning those, however, there is also a difference of opinion.—Some have said that if the *Kázee* give a trove property to the proprietor, on his describing the marks, or a fugitive slave to his master, on the acknowledgment of the slave that “the said person is his master,” it is incumbent upon him, in either case, to take security.—And all our doctors coincide in this opinion; because the right of the receiver is not proved, whence it is in the power of the *Kázee*, if he please, to withhold the slave from the person in question altogether.

If a person prove, by evidence, that a house then in the possession of another had been left between him and his brother, who is absent, in that case one half of the house must be given to him, and the other half left in the hands of the person who has possession; and no security must be exacted from him.—This is according to *Haneefa*.—The two disciples are of opinion that if the possessor deny the right, the share of the absent brother must be put into the hands of a trustee until his return; but if he acknowledge the right, it must then be left in his possession;—for they argue that a *denier*, as being an *opponent*, cannot be trusted with the property; whereas it may be entrusted to an *acknowledger*, as he is a friend and confidant.—The argument of *Haneefa* is that the decree of the *Kázee*, awarding that “the deceased left “the house to his heirs,” is a decree merely in favour of the *deceased*; for inheritance cannot take place unless the property of the person through whom it devolves be proved; and as there is a probability of the deceased having constituted the possessor trustee, it follows that the house cannot be taken from him; as holds in the case of his acknowledging it.—In regard to his *denial*, it is virtually annulled by the decree of the *Kázee*; and there is a probability of his not denying the right again, because the dispute in question has become known both to himself and the *Kázee*.—If the claim, in the case in question, relate to *moveable* property, some have said that the article is to be taken from

In the joint inheritance of a property held by a third person, the present heir receives his share; but no security is required in behalf of him who is absent.

from the possessor, according to all our doctors; because there is a necessity for the conservation of it; and this is answered in the best manner by the taking of it from the possessor, who, on account of his denial of the right of the other, may convert it to his own use, either from opposition, or from a belief of its being his own right: but when the *Kāzee* takes it from him, and deposits it with a trustee, the probability is that the trustee, from his integrity, will take care of it. The case is different with respect to immoveable property, for that is preserved in itself; whence it is that an executor, although he have power to sell the *moveables* of an absent heir, arrived at the age of maturity, yet cannot do so with regard to his *immoveable* property.—Others, however, have said that the same difference of opinion subsists with regard to *moveable* as obtains with respect to *immoveable* property.—It is to be observed that the opinion of *Haneefa*, that the half ought to be left in the hands of the possessor, is the most authentic, because there is a necessity for conservation, and this is answered in the best possible manner by putting it in the hands of one who is responsible in case of its loss, since it is likely that he will be most careful of it.—The possessor, moreover, is responsible in consequence of his denial, whereas a trustee is not.—With respect to what is further said, that “no security must be exacted,” it proceeds on this principle, that the exaction of bail is an occasion of litigation and contention; and it is the duty of the *Kāzee* to prevent these,—not to excite them.—If, in the case in question, the absentee return, there is no necessity for again producing evidence, because he is entitled to the half in virtue of the *Kāzee*’s decree in favour of the heir that was present; for any one of the heirs of a deceased person stands as litigant on the part of all the others, with respect to any thing due *to* or *by* the deceased, whether it be debt or substance; since the decree of the *Kāzee*, in such case, is in reality either in favour of or against the deceased; and any one of the heirs may stand as his representative with respect to such decree.—It is otherwise with respect to taking possession of the portion due to another from the estate of a person deceased;

ceased; that is to say, a part of the heirs, although they be litigants on behalf of another heir, cannot, however, take possession of his portion on his behalf, because a person, in taking possession, acts for himself, and is therefore incapable of acting in it, as agent, for another. Hence the person present is not entitled to receive any other portion than his own; in the same manner as where an heir claims a debt due to the deceased, and the *Kāzee* passes a decree in his favour; in which case the heir, although he stood as litigant in behalf of the other heirs, is yet not entitled to receive their shares of the debt.

OBJECTION.—If one heir be litigant in behalf of the other, it would follow that each creditor is entitled to have recourse to him for payment of his demand; whereas, according to law, each is only obliged to pay his *own* share.

REPLY.—The creditors are entitled to have recourse to one of several heirs only in a case where all the effects are in the hands of that heir. This is what is stated in the *Yama Kabeer*; and the reason of it is that although any one of the heirs may act as *plaintiff* in a cause on behalf of the others, yet he cannot act as *defendant* on their behalf, unless the whole of the effects be in his possession.

If a person say, “ I devote my *property* in alms to the distressed,” in that case the word *property*, thus generally used, is construed to mean that part of his property which is subject to *Zakāt*; whereas, if a person say “ I bequeath the third of my *property*,” the term *property* is in that case construed to apply to his property of every description. This distinction is according to a favourable construction.—Analogy would suggest, in the *former* instance also, that the *whole* property is understood; and this opinion has been followed by *Ziffer*; because the term *property* [*Māl*] applies to and includes property of every description, in a case of *alms-gift*, in the same manner as in a case of *bequest*. The reasons for a more favourable construction of the law in this particular are twofold.—FIRST, as obligation imposed by a person upon himself

An alms-gift of *Māl* includes all property subject to *Zakāt*.

himself is analogous to an obligation imposed by God; in other words, if a person impose any obligation on himself, it is valid only with respect to those articles concerning which God has imposed obligations upon mankind: an obligation of *alms*, therefore, imposed by a person upon himself, takes effect only with respect to such property as God has imposed alms upon.—Bequest, on the contrary, resembles inheritance, as the legatee succeeds to the property of the deceased in the manner of an heir; and hence a bequest of *property* is not restricted to any *particular description* of property.—SECONDLY, from his mode of expression it is reasonable to suppose that he undertakes to bestow in alms that part of his property only which is superfluous, and beyond the occasion of his wants; and this is the part on which *Zakât* is imposed. Bequest, on the contrary, as it takes place at a time when the testator is free from want, is considered as extending to the *whole* of his property.—It is to be observed that the speaker's declaration "I devote my property in alms, &c." includes also his *Asbooree* lands, according to *Aboo Yoosaf*, because land of this description is subject to the obligation of alms, agreeably to his tenets, that, in *tithe*, the consideration of *alms* is predominant.—According to *Mohammed*, on the contrary, his *Asbooree* land is not included, because, agreeably to his tenets, the consideration of *support to the state* is predominant in *tithe*.—His *Kbirdjee*, or *tribute* lands, are however not included, according to all our doctors, because tribute is designed purely as a support to the state, and *alms* are no consideration in it.

Case of an
alms-gift of
Milk.

If a person say "I devote my *possessions* [*Milk*] in alms to the distressed," there is in that case a difference of opinion. Some have said that this must be construed to mean the *whole* of his property; because the term here used [*Milk*] is of a more general nature than the term *Mâl* used in the former case:—the occasion, moreover, of restricting the application, in that instance, to such property as is subject to *Zakât*, is purely because of *Mâl* being the term used on that occasion in the KORAN; and such being the case, the term *Milk* must therefore

therefore be explained in its common acceptation. Others, again, have said that the terms *Milk* and *Mál* import the same thing in effect; and this is the better opinion; since both terms imply that part of his property which exceeds his wants, as was before mentioned; and that is the part of his property subject to *Zakát*.—If, however, a person have no other property besides what he obliges himself to bestow in alms, he must in that case reserve a sufficiency for his own subsistence, and bestow the remainder; and afterwards, upon his acquiring more property, bestow a part of it adequate to what he had before reserved. With respect to a *sufficiency for subsistence*, *Mohammed* has not determined the quantity, because of the different conditions of men. Some have said that a person is to reserve only one day's subsistence, in case of his being an artificer or labourer; one month's subsistence, in case he possess houses and shops let out upon lease; one year's subsistence, in case he possess immoveable property of lands; and so on,—in proportion to the length of time of receiving the income of his property;—and on this principle a *merchant* is to reserve as much as may suffice till the probable return of his property.

If a person be appointed executor to another, and he be not informed of that circumstance, but nevertheless sell some part of the effects of the deceased; the appointment becomes confirmed, and the sale is valid; whereas sale by an agent, on the contrary, is not valid, unless he be informed of his agency.—This distinction is according to the *Zábir Rawáyet*. *Abou Yousaf* is of opinion that the sale by the executor is also invalid, because an executor is, in fact, a person appointed to act as agent after the death of the testator, and must therefore be considered in the same light with an agent *before* death.—The reason of the distinction, as stated in the *Zábir Rawáyet*, is that the office of an executor is to *represent*, not to act as *agent*; for it refers to a period when the appointment of agency would be null. The acts of an executor, therefore, do not rest upon his knowledge of the testator's will any more than the acts of an heir;—in other words, if an

The acts of an executor are valid without any formal notification of his appointment.

heir were to sell some part of the effects of the deceased, not knowing that he was dead, the sale would be good; and so also of sale by an executor.—*Agency*, on the contrary, is merely a delegation, since in the case of agency the power and authority of the constituent still endure: the acts of an agent, therefore, rest upon his knowledge of his appointment.—The ground of this is, that in resting the acts of agents upon a knowledge of their appointments there is no injury to the constituent, since he is himself capable of performing such acts; whereas, if the acts of an executor were suspended on his knowledge of his appointment, an injury would result to his constituent, who is himself incapable of performing such acts.

An agent's appointment may be established by any casual information;

If a man appoint another his agent, and, a person having brought him intelligence of this*, he immediately, upon the receipt of it, perform some act, (such as *sale* for instance,) in that case the act is valid, whether the informant be free or a slave, of mature age or otherwise, an unjust or just man; because a simple information of his appointment establishes his right to act, although it be no way *binding* upon him.

but his dismissal cannot be established unless duly attested.

THE dismissal of an agent is not established until it be attested to the agent by two persons of unknown character, or by one just man. This is the doctrine of *Haneefa*. The two disciples have said that the law, in this case, is the same as in the preceding; for as the dismissal and appointment of agents are concerns of frequent occurrence, the notification of one person is therefore sufficient. The arguments of *Haneefa* are that the simple notification of dismissal is binding, as being a cause of the agent's desisting from action, and inducing responsibility for the property in his possession. The notification in question,

* By a *person* is here to be understood a person not deputed by the constituent, but one who having casually heard of the appointment brings information of it to the agent.

therefore,

therefore, is in one shape evidence, and consequently requires one of the two conditions of evidence, namely *number* [of the witnesses] or *integrity*; in other words, it requires to be attested by one just person, or by *two* persons of unknown character. It is otherwise with respect to the ratification of an *appointment* of agency, since that is no way binding, as has been already mentioned.—It is also otherwise where the dismissal is notified by a *messenger* from the constituent, because the word of a message-bearer is equivalent to that of the *sender* of it, from necessity, and in that case, therefore, the attestation of one just man or two unknown men is not required.—The same difference of opinion obtains in cases of information conveyed to a master of the crime of his slave,—to the *Sbafec* of the sale of a house,—to a virgin of her marriage,—or to *Mussulman* converts in a hostile country, who have not yet taken refuge in the *Mussulman* territory, of particular ordinances in regard to religion. Thus if an unjust person inform a master that a particular slave belonging to him had committed a crime, and the master afterwards sell or emancipate the said slave, it is not in that case incumbent upon him to pay the atonement, unless the notification of the crime be attested by one just man, or by two men of unknown character, according to *Haneefa*: contrary to the opinion of the two disciples.—In the same manner also, if an unjust person notify the sale of a house to the *Sbafec*, or person having the right of pre-emption over it, and the *Sbafec* should not thereupon put in his claim of *Sbaffa*, still, according to *Haneefa*, his right is not avoided; whereas, according to the two disciples, it is forfeited. So also, if an unjust person notify her marriage to a virgin, and she thereupon remain silent, such silence, according to *Haneefa*, is not an assent; but according to the two disciples it is.—So likewise, if an unjust man inform an absent *Mussulman* of new ordinances in respect to religion, and he should not conform accordingly, *Haneefa* holds that he is not in that case guilty of any offence; whereas the two disciples are of opinion that he is.

A *Kāzee* or his *Ameen* are not liable for any loss which may be incurred to the prejudice of another in selling an article to satisfy creditors.

If a *Kāzee*, or *Ameen* appointed by him, sell the slave of a certain person, in order to discharge the demands of his creditors, and the money, after the receipt, be lost or destroyed in the hands of the *Kāzee*, or his *Ameen*, and the slave be then proved to have been the property of some other person, in that case neither the *Kāzee* nor his *Ameen* is responsible for the loss; because if *Kāzees* were subject to such responsibility, no one would accept of the appointment; and the rights of the people would consequently be destroyed.—The *Kāzee*, therefore, not being responsible for the loss, the purchaser is entitled to an indemnification from the creditors on whose account the sale was made, because of the impracticability of his being indemnified by the party with whom he made the bargain.—In the same manner as where an incapable infant* or an inhibited slave appoints an agent for sale, who accordingly sells something on his behalf, and, the price being lost after he had received it, a right to the thing sold is proved by another; for in that case the claim is made on the *constituent*, and not the *agent*, although he be the party with whom the bargain was made.

If the loss be incurred by an *executor*, acting under the *Kāzee's* orders, the executor is indemnified by the creditors:

If a *Kāzee* command an executor, whom he himself had appointed, to sell a slave to satisfy the creditors of a deceased person, and the executor in obedience to this order accordingly sell the slave, and the slave afterwards prove the right of another, or die previous to his being delivered to the purchaser, and the price in the mean time be lost after it had been received by the executor,—the purchaser must in that case receive an indemnification from the *executor*, not from the *Kāzee*; because, having been appointed by the *Kāzee* to act as executor to the deceased, he is therefore a representative of the *deceased*, and not of the *Kāzee*; and hence, in the same manner as the deceased would have been responsible under such circumstances, in case he had himself made the sale during his lifetime, so also is the executor for

* Meaning an infant so young as to be incapable of acting for himself.

the sale made after his death. The purchaser, therefore, is entitled to exact the price from the executor; and he, again, is entitled to indemnify himself from the creditors, since he acted in the business of the sale on their behalf.—If, however, any more property of the deceased be afterwards discovered, the creditors are entitled to receive from it the payment of their debts, which are still held to remain in force.—Lawyers have also said that the creditors are, on their part, entitled to receive an indemnification from the estate for the compensation they made through the executor, to the purchaser, since they incurred that loss in behalf of the deceased.

AN infant heir, on whose account any thing is sold from the estate of a deceased person, is considered in the light of a creditor; in other words, if an infant heir stand in need of selling something, and the executor accordingly make such sale for him, and the subject of the sale afterwards prove the right of another,—in that case the purchaser is entitled to a compensation from the executor, and the executor from the heir.—If, on the other hand, the *Ameen* of the *Kázeer* sell any thing in behalf of an heir which afterwards proves the right of another; the proprietor is in that case entitled to receive a compensation directly from the heir, provided he be an adult; but if the heir be an infant, the *Kázeer* must appoint a person for the discharge of the debt from his property.

and an infant heir stands in the same predicament with a creditor in this particular.

SECTION.

IF a *Kázeer* say to a person “I have sentenced a certain man to be stoned; do you therefore stone him;”—or, “I have sentenced such a man to have his hand cut off; do you therefore cut it off;”—or, “I have sentenced this person to be scourged; do you therefore scourge him;”

Any person may execute a punishment by the *Kázeer*'s directions.

“ him;”—it is lawful for that person to act according to the *Kázee*'s orders.—This is the doctrine of the *Zábir Rawáyet*.—It is related of *Mohammed*, that he receded from this doctrine, and gave it as his opinion that the *Kázee*'s directions, as here stated, are not to be obeyed unless his sentence be attested by one just man; because there is a possibility of his being in an error; and if that should appear after the performance of any of these acts, it would be impossible to repair the injury thereby occasioned.—From this it would appear that the letters of one *Kázee* to another are not valid:—and our modern doctors greatly approve of this opinion, because many *Kázees* of the present age are loose and irregular: they, however, admit the validity of letters from one *Kázee* to another on the ground of necessity.—The arguments of the *Zábir Rawáyet* upon this point are twofold.—FIRST, the *Kázee* here gives information of a matter which he is competent to order; because it was in his power to have ordered the execution of the sentence immediately; hence, as he is liable to no suspicion, he ought to be credited.—SECONDLY, obedience to a magistrate in authority, such as the *Kázee*, is declared to be an incumbent duty; and as obedience to him is manifested in a belief of his word, it is therefore incumbent to believe him.—Besides, *Imám Aboo Manfoor Matirady* has said, “ If a *Kázee* be learned and just, believe and obey him, “ as there is then no reason to suspect him.—If, on the other hand, “ he be just but ignorant, it is then requisite to make enquiry of him “ concerning the case; and if, after a full investigation, it shall appear “ that his sentence was legally founded, in that case (and not otherwise) he must be believed.—If, on the contrary, he be learned “ but unjust in his conduct, or ignorant and unjust, his orders must “ not be obeyed, unless the person to whom he addresses himself “ discover the reason that prompted them.”

Case of a disputed decree, after a *Kázee*'s dismission

If a dismissed *Kázee* say to a person “ I have taken one thousand “ *dirms* from you, and paid it to another, according to a decree which “ I passed to that effect;” and the person in question deny this, and assert

assert that the *Káze* had taken it from him unjustly, still the declaration of the *Káze* must be credited, and consequently he is not responsible for the said sum. In the same manner also, if a dismissed *Káze* say to a person “ I passed a just sentence of amputation against “ you,” and the other assert that it was unjust, the word of the *Káze* must be credited. The law here proceeds on the supposition that in both these cases the persons acknowledge that the decrees were passed at a time when he was actually *Káze* ; and the reason of it is, that after such acknowledgment on their part, probability is an argument in favour of the *Káze* ; because the probability is that no *Káze* will pass an unjust decree. Neither is it necessary to exact an oath from the *Káze* in either of these cases, because an oath is never put to a *Káze*, and both the persons in question acknowledge that he was actually *Káze* when he passed these decrees.—It is to be observed that if the person who, in the first case, by order of the *Káze*, took the money, or who, in the second case, cut off the hand,—should severally declare that they had done so by order of the *Káze*, they are not responsible for the consequences, since the *Káze* was in office when he gave these orders, and the restitution of the property to its owner was an approved act on the part of the *Káze*, in the same manner as if he had made the restitution in the presence of the defendant.—If, on the other hand, the person assert that the *Káze* had issued such orders either antecedent to his appointment or after his dismissal, then also the declaration of the *Káze* must be credited, because he has referred the decree to a period which exempts him from responsibility. His declaration, therefore, is credited ; in the same manner as where a person subject to periodical madness at fixed and certain times, having divorced his wife or emancipated his slave, afterwards declares that “ he did these *during his madness* ;”—which is credited ; whence the divorce or emancipation are rendered void.—In this case, however, if the executioner of amputation, or the receiver of the money, acknowledge these deeds, they become responsible for them, because they themselves acknowledge the performance of acts, which induce responsibility,

from his office.

responsibility; since the authority under which they acted is doubtful; for the assertion of the *Kázee* is credited in these instances merely to procure an exemption to himself from responsibility, and not to procure it to others. It is otherwise in the *first* case, where these acts are allowed to have been performed in virtue of an order from him when he was actually *Kázee*.—All this proceeds on a supposition that the money no longer remains in the hands of the person who had received it in virtue of the *Kázee*'s decree: for if the money be still in the possession of the receiver, and he coincide with the *Kázee* concerning the amount, it must in this case be taken from him, whether the person from whom it was originally taken confirm the *Kázee*'s allegation, that “ he had paid the money to that person whilst he was “ in office,” or whether he plead that he [the *Kázee*] had taken and paid it whilst he was not in office; because as the receiver here in fact acknowledges that the money had formerly been in the possession of this person, his plea of having become *proprietor* of the money cannot be admitted but upon proof; and the mere allegation of the dismissed *Kázee* is not proof, since after dismissal he becomes as a common person.

H E D A R A.

B O O K XXI.

OF *SHAHADIT*, or *EVIDENCE*.

- Chap. I. Introductory.
Chap. II. Of the Acceptance and Rejection of Evidence.
Chap. III. Of the Disagreement of Witnesses in their Testimony.
Chap. IV. Of Evidence relative to Inheritance.
Chap. V. Of the Attestation of Evidence.
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C H A P. I.

IT is incumbent * upon witnesses to bear testimony, nor is it lawful for them to conceal it, when the party concerned demands it from them; because GOD says, in the KORAN, "LET NOT WIT-
Evidence is incumbent upon the requisition of the party concerned;

* Arab *Farz*; meaning an *ordained duty*, and therefore *indispensable*.

“NESSES WITHHOLD THEIR TESTIMONY WHEN IT IS DEMANDED FROM THEM;”—and also, “CONCEAL NOT YOUR TESTIMONY, FOR WHOEVER CONCEALS HIS TESTIMONY IS AN OFFENDER.”—The requisition of the party, however, is a condition; because the delivery of testimony is the right of the party, and therefore rests upon his requisition of it, as is the case with respect to all other rights.

but it is not obligatory in a case inducing corporal punishment,

IN cases inducing corporal punishment, witnesses are at liberty either to give or withhold their testimony as they please; because in such case they are distracted between two laudable actions; namely, the establishment of the punishment, and the preservation of the criminal's character: the concealment of vice is, moreover, preferable; because the prophet said to a person that had borne testimony, “*Verily it would have been better for you, if you had concealed it;*”—and also, because he elsewhere said, “*Whoever conceals the vices of his brother MUSSULMAN shall have a veil drawn over his own crimes in the two worlds by God.*”—Besides, it has been inculcated both by the prophet and his companions as commendable to assist in the prevention of corporal punishment; and this is an evident argument for the concealment of such evidence as tends to establish it. It is incumbent, however, in the case of *theft*, to bear evidence to the *property*, by testifying that “a certain person *took* such property,” in order to preserve the right of the proprietor: but the word *taken* must be used instead of *stolen*, to the end that the crime may be kept concealed: besides, if the word *stolen* were used, the thief would be rendered liable to amputation; and as, where amputation is incurred, there is no responsibility for the property, the proprietor's right would be destroyed.

unless it involve property, when the fact must be stated in such a way as may not occasion punishment.

The evidence required in *whoredom* is that of four men;

EVIDENCE is of several kinds. The evidence required in a case of *whoredom* is that of four men, as has been ordained in the KORAN; and the testimony of a woman in such case is not admitted; because

Zibra says, “ in the time of the prophet and his two immediate successors it was an invariable rule to exclude the evidence of women “ in all cases inducing punishment or retaliation ;” and also, because the testimony of women involves a degree of doubt, as it is merely a *substitute* for evidence, being accepted only where the testimony of men cannot be had ; and therefore it is not admitted in any matter liable to drop from the existence of a doubt.—The evidence required in other criminal cases is that of two men, according to the text of the KORAN ; and the testimony of women is not admitted, on the strength of the tradition of *Zibra* above quoted.—In all other cases the evidence required is that of two men, or of one man and two women, whether the case relate to property, or to other rights, such as marriage, divorce, agency, executorship, or the like.—*Shafei* has said that the evidence of one man and two women cannot be admitted, excepting in cases that relate to property, or its dependencies, such as *bire*, *bail*, and so forth ; because the evidence of women is originally inadmissible on account of their defect of understanding, their want of memory, and incapacity of governing, whence it is that their evidence is not admitted in *criminal* cases.

in other criminal cases,
two men;

and in all other matters,
two men, or one man and two women.

OBJECTION.—Since, according to *Shafei*, the evidence of women is originally invalid, it would follow that *their* evidence alone is not admissible even in a case of *property* ; whereas the evidence of four women alone is, in his opinion, admissible in such case.

REPLY.—The evidence of four alone is necessarily admissible in cases of property, because of their frequent occurrence :—contrary to the mode of proceeding with respect to *marriage*, (for instance,) which being a matter of greater importance and more rare occurrence than mere matters of property, cannot therefore be classed with them.

—The reasoning of our doctors is that the evidence of women is originally valid ; because evidence is founded upon three circumstances, namely, sight, memory, and a capability of communication ; for by means of the first the witness acquires knowledge ; by means of the

second he retains such knowledge; and by means of the third he is enabled to impart it to the *Kāzee*; and all these three circumstances exist in a woman; (whence it is that her communication of a tradition or of a message is valid:) and with respect to their want of memory, it is capable of remedy by the junction of another; that is, by substituting two women in the room of one man; and the defect of memory being thus supplied, there remains only the doubt of *substitution*; whence it is that their evidence is not admitted in any matter liable to drop from the existence of a doubt, namely, retaliation or punishment: in opposition to *marriage*, and so forth, as those may be proved notwithstanding a doubt, whence the evidence of women is admitted in those instances.

OBJECTION.—As the evidence of two women is admitted in the room of that of one man, it would follow that the evidence of four women alone ought to be admitted in cases of property and other rights; whereas it is otherwise.

REPLY.—Such is the suggestion of analogy. The evidence of four women alone, however, is not accepted, (contrary to what analogy would suggest,) because if it were, there would be frequent occasions for their appearance in public, in order to give evidence; whereas their *privacy* is the most laudable.

The evidence of women alone suffices concerning matters which do not admit the inspection of men.

THE evidence of one woman is admitted in cases of *ḥiṭb*, (as where one woman, for instance, declares that “a certain woman brought forth a certain child.”) In the same manner also, the evidence of one woman is sufficient with respect to virginity, or with respect to the defects of that part of a woman which is concealed from man.—The principle of the law, in these cases, is derived from a traditional saying of the prophet, “*The evidence of women is valid with respect to such things as it is not fitting for man to behold.*”—*Shafēi* holds the evidence of *four* women to be a necessary condition in such cases. The foregoing tradition, however, is a proof against him; and another proof against him is that, in the cases in question, the necessity

cessity of male evidence is remitted, and female evidence credited, because the ocular examination of a *woman*, in these cases, is less indecent than that of a man: and hence also, as the sight of two or three persons is more indecent than that of one, the evidence of more than one woman is not insisted on as a condition in those instances. It is to be remarked, however, that if *two* or *three* women give evidence in such cases, it is a commendable caution, because the evidence may be of an obligatory tendency.—The law with respect to the evidence of women in cases of birth has been fully set forth in the book of divorce, treating of *the establishment of parentage**, where it is said, that “if a man marry a woman, and she bring forth a child at a period of six months, or more, after her marriage, and the husband deny the parentage, in that case the evidence of one woman is sufficient to establish it:”—and there are also other examples recited to the same effect.—The law with respect to the evidence of a woman in cases of virginity, is that if a woman complain of the impotency of her husband, and assert that her virginity still exists, and another woman bear evidence of the same, in that case one year must be suffered to elapse, and then a separation must be effected between the husband and wife†; because virginity is a real entity, and the existence of it has here been attested by evidence.—The same rule also holds where a person purchases a female slave on condition of her being a virgin, and afterwards desires to return her, because of her being a woman: for if, in that case, another woman should examine into her condition, and then declare her to be a virgin, her evidence must be credited, as virginity is an entity, and the existence of it is here proved by evidence:—or if, on the contrary, she declare her to be a *woman*, her muliebriety (which is a defect) is established in virtue of such declaration, and the plea of the purchaser holds good: whence the seller is required to take an oath that such defect did not exist

* See vol. I. p. 382.

† That is, provided he shew no proof of virility in the interim. (See vol. I. p. 354.)

when

aces, except-
ing in cases
inducing pu-
nishment or
retaliation.

into his character in such a manner as to give the opposite party an opportunity to scorn him; because the prophet (according to a tradition related by Omar) has said, “*All MUSSULMANS are just with re-
spect to evidence, excepting such as have been punished for slander*; and also, because the probable character of all that profess the religion of *Islâm* is an abstinence from every thing prohibited by that religion; and here it is necessary to rest satisfied with *probability*, as the attainment of *certainty* is impracticable.—In cases, however, inducing retaliation or punishment, mere *probability* is not sufficient; and therefore a purgation of the witnesses must be made; for punishment and retaliation are cases in which all possible pretexts of prevention are to be sought: it is therefore requisite that, in such cases, the character of the witnesses be strictly investigated:—moreover, doubt is preventive in those instances.

If, however,
their probity
be questioned,
a purgation
is required.

IF the defendant throw a reproach on the witnesses, it is in that case incumbent on the *Kâzee* to institute an enquiry into their character; because, in the same manner as it is probable that a *Mussulman* abstains from falsehood, as being a thing prohibited in the religion he professes, so also is it probable that one *Mussulman* will not unjustly reproach another:—here, therefore, is a conflict between two probabilities; and hence the necessity of the enquiry of the *Kâzee* into the character of the witnesses, that he may discover which of the probabilities preponderates.—It is related as an opinion of *Abou Toosaf* and *Mohammed*, that a scrutiny must be made, with regard to the witnesses, both openly and privately, in all cases whatever; since the decree of the *Kâzee* rests upon proof, and proof rests upon the integrity of the witnesses. Besides, an enquiry into the integrity of the witnesses tends to preserve the decree of the *Kâzee* from annulment; because if he should pass a decree upon the *probable* character of the witnesses, and their falsehood should afterwards be discovered, the said decree would be rendered null.—Several have alleged that this disagreement between *Haneefa* and the two disciples is founded on the difference

difference of the times. In the present age, however, decrees are passed in this particular according to the doctrine of the two disciples.

—A *secret* purgation is made by a *Kázee* writing a letter, privately, to a *Moozkee*, or purgator, (that is, a person whose business it is to enquire into the characters of others,) and describing to him the family and countenances of the witnesses, and likewise their place of abode; and the purgator, in like manner, returning his answer privately to the *Kázee*, lest if it were known to the plaintiff, he might attempt to injure him. In an *open* purgation it is requisite that the *Kázee* summon together the purgator and the witnesses, and hear the examination himself.—During the first age (that is, in the time of the prophet and his companions) an *open* purgation was practised; but in the present times a *secret* one is adopted, in order to avoid quarrels and contentions between the purgator and the witnesses; for it is related as an opinion of *Mohammed* that an open purgation tends to sedition and contention. Some have said that it is requisite that the purgator report the witness not only to be *just*, but also *free*; for a slave may be just, but his testimony is nevertheless invalid. Others have said that his report of the *integrity* of the witness is sufficient; for his freedom is established [in probability] by his abode in a *Mussulman* country;—and this is approved.

Nature of a
secret

and an *open*
purgation.

It is to be observed that, according to that doctrine which maintains the necessity of the *Kázee*'s purgation of the witnesses, whether the defendant challenge their probity or not,—the justification of them by the defendant is not of any weight; in other words, if he declare the witnesses of the plaintiff to be upright men, yet his word is not credited; and such is the doctrine of the *Záhir Rawáyet*, from *Aboo Yoozaf* and *Mohammed*. It is also related, as their opinion, that the justification of the witnesses by the defendant is valid; under this condition, however, (according to *Mohammed*,) that there be also another justification; for he holds that two are always required, one being in no case sufficient.—The reasoning on which the doctrine of

Justification
of a witness
by the de-
fendant.

the *Zábir Rawáyet* proceeds in this particular, is that the defendant is, in the conception of the plaintiff and his witnesses, a liar, and his denial of the claim unjust and unfounded, but in which he nevertheless perseveres. He is therefore incapable of appearing as a purgator, since a purgator must be a person of integrity, according to all.—This proceeds on the supposition of the defendant having declared the witnesses to be just men, but that in the delivery of their testimony they had committed an error; or that they had been overpowered by forgetfulness. If, however, he declare that “they have spoken truth,” or that “they are just men and true speakers,” this amounts to an acknowledgment of the plaintiff’s right, and the *Kázee* must in such case pass a decree against him,—not on account of his *purgation of the witnesses*, but of his *acknowledgment*.

One purgator
suffices.

ONE purgator is sufficient, and two are superfluous, according to *Haneefa* and *Aboo Yoosaf*. *Mohammed*, on the contrary, maintains that purgation is not valid unless performed by *two*.—A similar disagreement subsists between them, with respect both to the messenger who goes to the purgator on the part of the *Kázee*, and also the interpreter employed to explain and interpret the deposition of the witnesses.—The argument of *Mohammed* is, that as the power of the *Kázee* to pass a decree is founded upon the evidence of the probity of the witnesses, and as the evidence of their probity is founded upon purgation, it follows that *plurality* is in this instance requisite, in the same manner as *probity*,—or as, in cases inducing punishment, it is required that the witnesses be males.—The argument of *Haneefa* and *Aboo Yoosaf* is that purgation is not considered in the nature of evidence; whence neither the assembly of the *Kázee*, nor the use of the phrase *Shabádit*, are required as conditions with regard to it. Besides, the necessity of a plurality in evidence is a mere matter of *religion*,—in other words, is founded on a passage in the KORAN, in opposition to analogy; for the truth of any assertion obtains an ascendancy from the declaration of one just person, so far as relates to practice, as is evident from this circumstance,

circumstance, that many of the traditionary precepts which it is necessary to follow, have been delivered by one man;)—and as the necessity of a plurality in evidence is contrary to analogy, the establishment of such necessity in purgation, by inference from that rule, would be absurd.

As the qualifications requisite to a witness are not required in a purgator, a slave is capable of being a purgator in a *secret* purgation. In an *open* purgation, however, the purgator must, according to all our doctors, be possessed of the qualifications necessary to a witness, because of what is recorded by *Khasāf*, that “an open purgation is restricted to the assembly of the *Kāzee*.”—Lawyers have observed, also, that in the purgation of witnesses to whoredom four purgators are necessary, according to *Mohammed*.

A slave may be a purgator in the secret purgation.

SECTION.

THE things which witnesses retain, and bear testimony of, are of two kinds.—The first are those which produce effect in themselves; such as sale, acknowledgment, usurpation, murder, and the sentence of a judge; in all of which the effect results from the things themselves; and consequently, whenever a person hears or sees any thing of importance relating to these matters, he may lawfully give evidence of it, without its being demanded from him; because in these cases, immediately upon his hearing or seeing, he becomes acquainted with a circumstance which occasions effect in itself, and there is therefore no need of such evidence being demanded from him.—In such case, also, it is requisite that he deliver his testimony thus, “I give evidence that a certain person bought, &c.” and not, “evi-

Evidence is of two kinds:—that which occasions effect in itself,

and that the
effect of
which rests
upon other
evidence.

“ dence has been demanded from me, &c.” because this latter mode of delivery is false. If, however, a person from without a door, or from behind a curtain, hear any thing spoken by another that is within, in that case he is not entitled to give evidence of the same; and if he should attest it, the *Kâzee* must not accept it, because it is illegal, since, as voices are often similar, they cannot be distinguished with certainty. But if, having first entered into the house, he discover that there is only one person within, and having then retired, and sat without the door, he hear that person make an acknowledgment, he may then lawfully attest the same, because in such case he acquires certain knowledge.—The second kind of things to which evidence relates, are those which do not occasion effect in themselves; such as *testimony* *, which does not occasion effect in itself; because, as it is merely *information*, it admits the supposition of being either true or false; and such things as are doubtful are not decisive proof.—Upon testimony being given, therefore, the hearer does not immediately know that the right is proved; and consequently, if one person hear another give evidence of something, he is not empowered to give evidence of the same, unless the witness desire him to attest his evidence; because evidence does not occasion effect in itself, nor until it be removed to the assembly of the *Kâzee*.—Besides, as the attestation of the evidence of another is an overt act with respect to that other, it is requisite that the other previously appoint this person his deputy; and in the case in question this is not supposed.—In the same manner, also, if a person hear another desire a *third* person to attest his evidence, it is not lawful for him in such case to give evidence of the same, because the original witness appointed *another*, and not *him*, his deputy for that purpose.

The signature
to a deed must
not be attested,

If a person see his own signature to a bill of sale, or the like, he must not, merely on account of the sight of his signature, attest it,

* Meaning testimony to evidence given by another.

unless

unless he otherwise recollect to have witnessed the said bill; since hand writings are often similar.—Some have said that this is the doctrine of *Haneefa*; but that the two disciples are of a different opinion.—Others, again, have said that all are agreed in its being unlawful to give the attestation merely on the sight of the signature; and that the only case of this kind in which there is a disagreement is that with respect to a *Kāzee*; for if he should discover, in his *Dewan*, or records, the evidence of any one, or a decree of his own, he may, in such case, (according to the two disciples) pass a decree agreeably thereto, notwithstanding he have forgot the circumstance; because the records of the *Kāzee*, being kept under his seal, are therefore secured against alterations, and consequently afford certain knowledge.—It is otherwise with respect to bills of sale or the like, because these, as being kept in the hands of others, are not secured against alterations.—In the same manner, also, if a person recollect the place in which his evidence had been taken, without remembering the affair to which it related, it is the same as his seeing his signature without remembering his subscription of it, and therefore he is not permitted to attest it:—and the same rule obtains where people in whom he places credit say to him, “you and we did formerly jointly attest such particular matter.”

unless the witness recollect the circumstance of signing it.

It is not lawful for a person to give evidence to such things as he has not actually seen, excepting in the cases of birth, death, marriage, cohabitation, and the jurisdiction of a *Kāzee*, to all of which he may lawfully bear testimony on creditable *bearsay*.—This proceeds upon a favourable construction.—Analogy would suggest that it is not lawful for him to give evidence in those cases also; because evidence is founded entirely on sight, from which knowledge is derived; and as no certain knowledge can be acquired without sight, it follows that evidence, in the cases above excepted, is not valid unless founded upon sight.—The reason for a more favourable construction, in this particular, is that these events are of such a nature as admit the privacy only of a few :

Evidence cannot be given on *bearsay*, except to such matters as admit the privacy only of a few :

few:—thus *birth* (for instance) is an event at which none is present but the midwife; the authority of the *Kázee* is founded on the appointment of the *Sultan*, which is seen only by the *Vizier*, or at most a few others; marriages and deaths are seen by but few; and cohabitation by none. All these, however, are acts from which originate many important concerns. If, therefore, the reality of these things were not admitted upon hearsay evidence, many inconveniences would result: in opposition to cases of *sale*, or the like, where privacy is not required.—It is to be observed that it is requisite, in these cases, that the information have been received from two just men, or from one just man and two women.—Some have advanced that in cases of *death* the information of one man or one woman is sufficient, because death is not seen by many, since as it occasions horror the sight of it is avoided.

and it must
be given in
an *absolute*
manner.

WHEN a person, in any of the above cases, gives evidence from creditable hearsay, it is requisite that he give it in an *absolute* manner, by saying, for instance, “I bear testimony that A. is the son of B.” and not, “I bear testimony so and so, *because I have heard it*,”—for in that case the *Kázee* cannot accept it;—in the same manner as if a person, having seen a thing in the hands of A. were to say, “This “thing is the property of A.” in which case his testimony is valid: but if he should state that “he gives evidence *because he has seen the “thing in the possession of A.*” the *Kázee* could not accept his testimony.—So also, if a person see another sitting in the court of justice, deciding in a suit between plaintiff and defendant, it is lawful for him to give evidence that “that person was a *Kázee*.”—or, if a person see a man and woman dwelling in the same house, and conducting themselves towards one another in the manner of husband and wife, he may lawfully give evidence of their being husband and wife; in the same manner as it is lawful for a person who sees a melon in the hand of another to give evidence that it is the property of that person.

IF a person say that he was present at the burial of another, or that he had read the funeral service over him, this amounts to the same as an actual sight of the death, insomuch that if he should explain to the *Kázee* the principle on which he gives his evidence, it will still be valid.

Evidence to the burial of a person amounts to evidence of his death.

WHAT is above advanced, that "it is not lawful for a person to give evidence to such things as he has not actually seen, excepting in the cases of birth, death, marriage, cohabitation, and the jurisdiction of a *Kázee*," is taken from *Kadooree*; and from these particular exceptions it may be inferred that *hearsay* evidence is unlawful in every other instance, such as *Willa*, charitable appropriations, and so forth.—It is indeed related, as the last opinion of *Abco Yoosaf*, that evidence from *hearsay* is lawful in a case of *Willa*; because *Willa* is equivalent to relation by consanguinity, as the prophet has said "WILLA is a connection like consanguinity."—It is also related, as the opinion of *Mohammed*, that *hearsay* evidence is lawful in a case of appropriation; for as appropriation continues to operate for a long period of time, the laws with respect to it would be rendered null if *hearsay* evidence were not admitted to prove it.—Our doctors, however, argue that *Willa* is founded upon a relinquishment of right of property; and as, in bearing evidence to *that*, actual sight is required, it follows that it is in the same manner required with respect to a matter derived therefrom, namely, *Willa*.—With respect to charitable appropriations, on the contrary, *hearsay* evidence must be admitted so far as regards the appropriation itself, (such as where the witness says, "I attest this to be a *wakf*:") but it is not admitted with respect to any conditional restrictions imposed by the appropriator; for although the appropriation itself be notorious, yet the conditions of it are not so.

IF a person see any article, (excepting an adult male or female slave,) in the hands of another, he may in such case lawfully attest its

A right of property may be attested,

from seeing
an article in
the possession
of another :

its being the property of that other, because possession argues property, since in all causes of property, such as *purchase, sale*, or the like, possession is the argument of its existence.—For instance; if a person sell any thing, his possession is an argument of the legality of the sale; and in the same manner, also, the right of property is established in a purchase from the possession of the seller, and the right of property in an heir, from the possession of him from whom he inherits.—Hence, in giving evidence of a thing being the property of another, it is sufficient to have seen it in his possession.—It is recorded from *Abou Yoosaf*, that besides the *sight* of the possession, it is requisite that the witness verily believe the article to be the property of the possessor, inasmuch that if he do not really think so he cannot lawfully attest on the possessor's behalf.—Several of our doctors also remark that this explanation applies to the opinion of *Mohammed*, above related, respecting the legality of attesting marriage, birth, and cohabitation on hearsay;—that is, that it is lawful for a person to attest any of these incidents upon hearsay, provided he believe it in his own mind, but not otherwise.—*Shafe'i* has said that possession, together with transaction*, argues property; (and many of the *Haneefite* doctors are also of this opinion;) because possession being of two kinds, namely, either in virtue of trust or of right of property, does not argue right of property unless when united with the performance of acts.—Our doctors, on the other hand, argue that transaction is also of two kinds; one, in virtue of delegation, and the other in virtue of original authority;—and hence the junction of transaction to possession leaves still a doubt in regard to the property.—In short, if a *probable* argument be adopted, possession is then sufficient; but if a *certain* one be required, possession, even when joined to transaction, could not be sufficient.—It is to be observed that the case here treated of admits of four statements. I. Where a person sees both the proprietor and the

* Arab. *Tasarruf*; meaning (in this place) any act of mastery performed with respect to the property in question, such as letting it out to hire, for instance.

property,

property, and is acquainted with both,—that is, with the countenance and the family of the proprietor, and with the boundaries of the property, which he sees him possess without strife; and afterwards sees the same thing in the possession of another; and the first proprietor appears to claim it;—in which case it is lawful for him to give evidence of its being the property of the first person, because of his having seen it in his possession. II. Where he sees the property, and its limits, but not the proprietor;—and here also it is lawful for him to give evidence of the property, (upon a favourable construction of the LAW) because the proprietor is known, so far as regards his *family*, from hearsay.—III. Where he neither sees the proprietor nor the property;—and, IV. Where he sees the proprietor but not the property; in both of which cases it is unlawful to give evidence with regard to the right of property.

IF a person see a slave, male or female, in the possession of another, and know the said person to be a slave, he may lawfully give evidence to such slave being the property of that other;—for a slave not being his own master, and of consequence not entitled to go where he pleases, is apparently the property of that person in whose hands he remains. So also, if he should not know the person seen in the possession of another to be a slave, and being an infant, it should be incapable of explaining its own condition, he may in that case lawfully give evidence of its being the property of the possessor; for an infant is not its own master.—But if the person seen be arrived at the age of maturity,—that is to say, be capable of explaining his condition,—and he should not know whether he is a slave or not, then it is not lawful to give evidence of his being the property of the possessor, simply on the sight of the possession.—This is the reason of the exception, in the preceding case, of a slave arrived at the age of maturity; and the ground of it is that persons arrived at the age of maturity are in a manner in their own possession; and therefore the possession of another, which indicates the right of property of that other, is not to be dis-

and the right of property in a slave may also be attacked on the same ground.

covered from the simple sight.—It is related as an opinion of *Haneefa*, that even in this case evidence to the right of property may lawfully be given: but what has been before related is the most authentic doctrine.

CHAPTER II.

Of the *Acceptance and Rejection of Evidence.*

The evidence
of a blind man
is inadmissi-
ble:

THE evidence of a blind man is not admissible.—*Ziffer* maintains that the evidence of a blind man is admissible with respect to matters in which hearsay prevails; (and there is also one report of the doctrine of *Haneefa* to the same effect;) because in such matters hearing only is required, and in the hearing of a blind man there is no defect.—*Aboo Toosaf* and *Shafei* have said that the evidence of a blind man in these matters is lawful, provided he was possessed of sight at the time of their occurrence; for by means of that he acquires a certain knowledge, which he is afterwards, notwithstanding his want of sight, capable of communicating, as that depends entirely on the tongue, which in a blind man is not defective; and it is in his power to shew his knowledge of the person with regard to whom he gives the evidence, by a description of his birth and family.—Our doctors, on the other hand, argue that in the delivery of evidence there is a necessity to distinguish between the persons for and against whom it is given; and a blind man is incapable of doing this otherwise than by the voice; and this is attended with a doubt; which may be avoided, by the party producing a witness possessed of sight.—With respect to the assertion of *Shafei* and *Aboo Toosaf*, that “it is in his power to shew
“ his knowledge of the person with regard to whom he gives the
“ evidence

“evidence by a description of his birth and family,” it may be replied that this mode has been instituted for a definition of the *absent*, not of the *present*.—In short, in the same manner as the evidence of a blind man is inadmissible in cases relative to retaliation or punishments, so also is it inadmissible in all other cases whatever.

If a person, having given evidence, should afterwards become blind previous to the passing of the decree, in that case (according to *Haneefa* and *Mohammed*,) it is not lawful for the *Kāzee* to pass a decree thereupon; for the existence of the competency of the witnesses *at the time of passing the decree* is a necessary condition, as the validity of the evidence, at that time, constitutes the proof; and in the case here supposed the evidence has at that period become null. This case is therefore the same as if a witness, after having given evidence, should either become insane, dumb, or unjust, in any of which cases the *Kāzee* could not pass a decree upon the evidence so given.—It is otherwise where the witnesses, having given their evidence, either disappear or die; for in that case the *Kāzee* may lawfully pass a decree upon it; because the competency of evidence is not annulled, but rather concluded, and rendered complete, by death; and *absence* does not destroy this competency.

and if a person give evidence, and become blind, a decree cannot issue upon it.

THE testimony of any person who is *property*,—that is to say, a slave, male or female,—is not admissible; because testimony is of an authoritative nature; and as a slave has no authority over his own person, it follows that he can have no authority over others, *a fortiori*.

The evidence of a slave is not admissible;

THE testimony of a person that has been punished for slander is inadmissible, even though he should afterwards have repented; because God has said, in the *Koran*,—“BUT AS TO THOSE WHO ACCUSE
“MARRIED PERSONS OF WHOREDOM, AND PRODUCE NOT FOUR
“WITNESSES OF THE FACT, SCOURGE THEM WITH FOURSORE

or of a slanderer:

“STRIPES, AND RECEIVE NOT THEIR TESTIMONY FOR EVER;
 “FOR SUCH ARE INFAMOUS PREVARICATORS,—EXCEPTING THOSE
 “WHO SHALL AFTERWARDS REPENT.”—The rejection of his evidence, moreover, is included as a part of the punishment prescribed for the crime, as this tends to prevent the commission of it in future; and as the rejection of his evidence is a part of the punishment, this effect must evidently remain after his repentance, on the same principle as the punishment itself is not remitted although he repent. It is otherwise with respect to a person punished for any other crime; for the evidence of such a person is admissible after repentance, since the rejection of it, in regard to *him*, proceeded from the stigma attached to his offence, which is done away by repentance.—According to *Shafai* the evidence of a person punished for slander is admissible, provided he have afterwards repented, because God, in enjoining the rejection of the evidence of such, has particularly excepted *penitents*.—Our doctors, on the other hand, argue that the exception in the divine ordinance relates to that part of it which declares slanderers to be *infamous prevaricators*, and not to that part which declares them to be incompetent as witnesses. Penitence, therefore, removes the stigma from the character of such a person, but does not restore his competency to give evidence.

but an *infidel*
 slanderer re-
 covers his
 competency
 as a witness
 upon embrac-
 ing the faith.

If an infidel, who had suffered punishment for slander, should afterwards become a *Mussulman*, his evidence is then admissible; for although, on account of the said punishment, he had lost the degree in which he was before qualified to give evidence, (that is, in all matters that related to his own sect,) yet by his conversion to the *Mussulman* faith he acquires a new competency in regard to evidence, (namely, competency to give evidence relative to *Mussulmans*,) which he did not possess before, and which is not affected by any matter that happened prior to the circumstance which gave birth to it.—It is otherwise with respect to a slave, who, having suffered punishment for slander, afterwards becomes free; for his testimony is not admissible
 after

after emancipation; because in his former condition of slavery he did not possess, in any degree, ability to give evidence, and consequently the punishment was incomplete, since it was impossible to subject him to any greater degree of discredit than what was before imposed on him: the credit, therefore, which he would otherwise have acquired afterwards in virtue of his emancipation, is taken from him in order to complete the prescribed punishment.

TESTIMONY in favour of a son or grandson, or in favour of a father or grandfather, is not admissible; because the prophet has so ordained.—Besides, as there is a kind of communion of benefits between these degrees of kindred, it follows that their testimony in matters relative to each other is in some degree a testimony in favour of themselves, and is therefore liable to suspicion.

Evidence is not admitted in favour of relations within the degree of *paternity*.

THE prophet has said, “ *We are not to credit the evidence of a wife concerning her husband, or of a husband concerning his wife**; or of a slave concerning his master; or of a master concerning his slave; or, lastly, of a hirer concerning his hireling.—The author

nor between an husband and wife, a master and his slave, or an hirer and his hireling.

* This doctrine of the inadmissibility of the evidence of husband and wife in favour of each other prevails only amongst the *Soonis*, [the followers of *Omar*,] and has given rise to much contention with the *Shiyas*, [the followers of *Ali*], who maintain the opposite doctrine.—The origin of their disagreement on this occasion is thus related.—The prophet in the course of his wars having been presented with the village of *Fatimah* by some Christians, who saw the impossibility of resisting his power, determined to have divided it amongst his companions, as was his usual practice in regard to the spoils taken in war. He was afterwards, however, induced to give it to his daughter *Fatima*, in consequence of a revelation he received from heaven, enjoining him not to give out of his family what had been freely conferred upon him.—After his death it was fixed upon by his successor *Abu Beker*; and when *Fatima* claimed it in consequence of the gift of her father, and produced her husband *Ali*, and her two sons, as witnesses, her claim was rejected by *Abu Beker*, on the grounds of the testimony of relations in that degree having been declared inadmissible by the prophet. This tradition, thus quoted by *Abu Beker*, has ever since amongst the *Soonis* occasioned the inadmissibility of the evidence of husband and wife

of this work observes that by the term *birer* [*Ajeer*] as used in this place, is to be understood (according to the explanation of the Lawyers) a select scholar who considers an injury to his teacher as an injury to himself.—Others have said that it is understood to mean a person who lets out any thing by lease for a month or a year; for as, at the time of giving evidence, he is entitled to the rent, in return for the usufruct enjoyed by the other, a suspicion arises of his having constituted this person his tenant merely with a view to procure his evidence.—With respect to the evidence of a husband and wife concerning each other, *Sbafei* maintains that it is admissible; because the property of each is distinct and separate; and also because distinct seizins are made, by each, of their respective property; whence it is that retaliation is executed upon either for the murder of the other,—and also, that either may be imprisoned for a debt due to the other.—Besides, the benefit which they mutually derive from each other's property is of no account, because the existence of such benefit is of an *involved* nature*;—in the same manner as the evidence of a creditor in favour of his indigent debtor is admissible, notwithstanding he derive a benefit from it, as this benefit is of an *involved* nature.—The arguments of our doctors upon this point are twofold. FIRST, the traditionary precept of the prophet above quoted. SECONDLY, the benefit which, from custom, the husband and wife derive from the property of each other, which occasions their testimony in favour of each other to be, in a manner, testimony in favour of *themselves*, and consequently liable to suspicion.—It is otherwise with respect to the testimony of a creditor in favour of his indigent debtor, because he has no power over the

wife in favour of each other. The *Sbiyas*, however, (who follow a contrary doctrine) maintain that this pretended precept of the prophet was purposely forged by the *Kbaif* to defraud *Faime* of her right; and in support of this opinion they argue that if such a precept had existed, it could not have been unknown to *Alu*; and that if he had known of it, he never would in such case have appeared as a witness in favour of his wife.

* That is to say, is interwoven with, and necessarily arises from, the particular circumstances of their relative situation.

property

property of the debtor, whereas a husband and wife have such power from usage and custom.

THE testimony of a master in favour of his slave is not admissible; because of the tradition above quoted; and also because, if the slave be not indebted to any person, such testimony is in *every* respect in favour of himself;—or if, on the other hand, he *be* indebted, still the testimony of the master is in *some* respect in favour of himself, as the matter remains in suspense; for if the master should choose to pay the debts, the testimony would be completely relative to himself, whereas it would not be so in any degree in case he should permit the slave to be sold in liquidation of the debt;—and as it is not known which mode he may follow, the testimony is therefore considered to be in some respect relative to himself.—It is to be observed that the evidence of a master in favour of his *Mokdsib* is not admissible, for the reason here stated.

The testimony of a master cannot be admitted in favour of his slave;

THE testimony of one partner in favour of another, in a matter relative to their joint property, is not admissible; because it is in some degree in favour of *himself*.—The testimony, however, of partners, in favour of each other, in matters not relating to their joint property, is admissible, because in it there is no room for suspicion.

nor of one partner in favour of another (relative to their joint concern.)

TESTIMONY in favour of a *brother* or an *uncle* is admissible, because the property and the immunities of these classes of relations are separate, and each has no power over that of the other.

Testimony in favour of an *uncle* or *brother* is admitted.

THE testimony of women that lament or sing is not admissible, because they are guilty of forbidden actions, inasmuch as the prophet has prohibited these two species of noise.—(It is to be observed that this case alludes to a woman who laments for the adversity of *others*, not for her *own*, and who hires herself out for that purpose.)

The testimony is not admissible of public mourners or singers,

THE

or of common
drunkards;
or of falconers,
&c.

THE testimony of a person who is continually intoxicated is inadmissible, because of his commission of a prohibited act.—In the same manner, also, the testimony of a person who amuses himself with birds, such as pigeons or hawks, is inadmissible; because such amusement engenders forgetfulness; and also because, in the practice of it, he sees the nudities of strange women, he having occasion to sit on the top of his house to fly these birds.—In some copies, instead of the amusement of *Teyoor* or birds, that of *Tamboor**, or musical instruments, is written, which alludes to public singers; and the testimony of a public singer is not admissible, because he is the occasion of assembling a number of people to commit a prohibited action†.

or of atrocious
criminals;

THE testimony of a person who has committed a great crime, such as induces punishment, is not admissible, because in consequence of such crime he is *unjust*

of criminals
in prisons;

THE testimony of a person who goes naked into the public bath is inadmissible, because of his committing a prohibited action, in the exposure of his nakedness.

or of usurers,
or gamblers;

THE testimony of a person who receives usury is inadmissible;—and so, also, of one who plays for a stake at dice, or chess,—because gaming in that manner is ranked in the number of great crimes;—and in the same manner, also, the evidence of a person who omits his prayers, from an attention to these games, is not admissible.—It is to be observed, however, that simple playing at chess without a stake is

* In the Arabic and Persian, the words *Teyoor* and *Tamboor* are written exactly similar; and as they can only be distinguished from each other by the proper position of the diacritical points, they are therefore very liable to be confounded by the frequent omission of these points.

† Namely, *listening to music*.

not destructive of credit, since such play does not induce a want of integrity, because all our *Imáms* are not agreed in its illegality, *Málik* and *Shaféi* having declared it to be lawful.—It is recorded in the *Mabsoot*, that the evidence of an usurer is inadmissible only in case of his being so in a notorious degree; because mankind often make invalid contracts; and these are, in some degree, usurious.

THE evidence of a person guilty of base and low actions, such as making water or eating his victuals on the high road, is not admissible; because where a man is not restrained, by a sense of shame, from such actions as these, he exposes himself to a suspicion that he will not refrain from falsehood.

or of persons guilty of indecorum;

THE evidence of a person who openly inveighs against the companions of the prophet and their disciples is not admissible, because of his apparent want of integrity.—It is otherwise, however, where a person conceals his sentiments in regard to them, because in such case the want of integrity is not apparent.

or of free-thinkers, if they avow their sentiments.

THE evidence of the sect of *Háwa** (that is, such as are not *Soonis*) is admissible; excepting, however, the tribe of *Khetabla*, whose evidence is inadmissible, for reasons that will be hereafter explained.—*Shaféi* maintains that the evidence of no tribe whatever of the sect of *Háwa* is admissible, because the heterodox tenets they profess argue the highest degree of depravity.—Our doctors, on the other hand, argue that although their tenets be in reality wrong, yet their adherence to them implies probity, since they have been led to embrace

The evidence of the sect of *Háwa*, and other heretics, admissible, but not that of the tribe of *Khetabla*.

* Anglice, the *air*; a derivative appellation given by the *Soonis* to the *Shiyyas*.—*Háwa*, also, is used to express the sensual passions, whence the term *Abil Háwa* signifies *sensualists*, or *epicureans*.

them from an opinion of their being right; and there is, moreover, reason to think that they will abstain from falsehood, because it is prohibited in every religion. Hence the case is the same as if a person should eat of an animal which had not been slain according to the prescribed form of *Zabbab*, because of its being lawful amongst his sect. It is otherwise where the baseness proceeds from the *actions*, not from the *belief*.—With respect to the sect of *Kbetabia*, it is to be observed that they are in a high degree heretics; and amongst them it is lawful to bear positive testimony to a circumstance on the grounds of another having sworn it to them. Some have said that it is an incumbent duty upon that sect to give evidence in favour of each other, whence their testimony is not free from suspicion.

Zimmes may testify concerning each other.

THE testimony of *Zimmes* with respect to each other is admissible, notwithstanding they be of different religions.—*Malik* and *Sbafei* have said that their evidence is absolutely inadmissible, because, as infidels are unjust*, it is requisite to be slow in believing any thing they may advance, GOD having said (in the KORAN) “WHEN AN “UNJUST PERSON TELLS YOU ANY THING, BE SLOW IN BELIEVING “HIM;”—whence it is that the evidence of an infidel is not admitted concerning a *Mussulman*; and consequently, that an infidel stands (in this particular) in the same predicament with an apostate.—The arguments of our doctors upon this point are twofold.—FIRST, it is related of the prophet, that he permitted and held lawful the testimony of some *Christians* concerning others of their sect.—SECONDLY, an infidel having power over himself, and his minor children, is on that account qualified to be a witness with regard to his own sect; and the depravity which proceeds from his faith is not destructive of this qualification, because he is supposed to abstain from every thing prohibited in his own religion, and falsehood is prohibited in every religion. It is otherwise with respect to an apostate, as he possesses no power,

* Arab. *Fisik*; meaning, in this place, *degenerate* or *depraved*.

either

either over his own person, or over that of another; and it is also otherwise with respect to a *Zimnee* in relation to a *Mussulman*, because a *Zimnee* has no power over the person of a *Mussulman*.—Besides, a *Zimnee* may be suspected of inventing falsehoods against a *Mussulman*, from the hatred he bears to him on account of the superiority of the *Mussulmans* over him.

OBJECTION.—In the same manner as there subsists an enmity between *Mussulmans* and *Zimnees*, so also is there an enmity between the followers of other religions, such as the *Jews*, the *Christians*, and the *Magians*: it would follow, therefore, that amongst these the testimony of those of one religion cannot be admitted with relation to others of a different religion;—whereas it hath been declared admissible.

REPLY.—Although the religions of these be different, yet none of them being under subjection to another, so as to engender reciprocal hatred, there is no cause to suspect that they will invent falsehoods against each other.

THE testimony of an infidel *Moostámin* with relation to a *Zimnee* is not admissible, because he has no power over the person of a *Zimnee*, as the latter is a fixed resident in the *Mussulman* territory. The evidence of a *Zimnee*, however, is admissible with respect to an infidel *Moostámin*, in the same manner as the evidence of *Mussulmans* with relation to them is valid.

A Moostámin cannot testify concerning a Zimnee; but a Zimnee may testify concerning a Moostámin;

THE testimony of one *Moostámin* is admissible with respect to another *Moostámin*, provided he be of the same country. If, however, they be of different countries (such as a native of *Russia* and of *Turkey*) their testimonies with respect to each other are not admissible; because this difference precludes the operation of their power over each other; whence it is that they cannot inherit of each other.

and Moostámins may testify concerning each other, being of the same country.

The testimony
is admissible,
of any one
whose virtues
preponderate;

THE testimony of him whose virtues exceed his vices, and who is not guilty of great crimes, is admissible, notwithstanding he may occasionally be guilty of *venial* crimes.—What is here advanced is an explanation of the degree of integrity to which regard is paid in bearing evidence: and this explanation is approved; for innocence with respect to *great* crimes, and a preponderance of virtue over vice, must necessarily be deemed sufficient, on this principle, that if any occasional commission of smaller crimes were destructive of testimony, the door of evidence would be shut, whilst the preservation of the rights of mankind requires that it should be kept open.

and of such
as remain un-
circumcised
from any jus-
tifiable cause;

THE testimony of one *Acklif* (that is, of one who has omitted circumcision on account of old age, or for some other sufficient reason) is admissible, because the omission of this ceremony is not destructive of justice;—excepting where it arises from a contempt of religion, or of the authority of the oral law by which it is enjoined, for in that case integrity no longer remains.

or of an *eunuch*;

THE testimony of an *eunuch* is admissible, because *Omar* accepted the testimony of *Alkia*, who was an eunuch; and also, because he has been deprived of one of his members by *violence*, and therefore stands in the same predicament with one who has been mutilated.

or of a *bastard*;

THE testimony of a *bastard* is valid, because he is innocent with respect to the immorality of his parents. *Imâm Mâlik* maintains that the testimony of a bastard is not to be admitted with respect to *whoredom*, as it may naturally be supposed he wishes as many others as possible reduced to the same level with himself, and his testimony in a matter of this kind is therefore liable to suspicion.—Our doctors, however, argue that the present question relates merely to the point of *integrity*; and if a *bastard* be a just man, there is no reason to suspect him of such a wish.

THE

THE testimony of a hermaphrodite is admissible, because such a person is either a man or a woman, and the evidence of both is admissible. or of an hermaphrodite;

THE testimony of a governor on the part of the sultan is admissible, according to a majority of the *Hanefite* doctors, provided he do not enforce oppression; but if he act oppressively his testimony is not admissible. Some have said that in the latter case also his testimony is admissible, provided he be himself a man of generosity and character, and be not guilty of boasting and vain talk; because it is in such case natural to suppose that a regard for his reputation will prevent his asserting a falsehood; and the dignity of his character will deter any one from offering him a bribe. or of a vicerey.

WHERE two brothers attest that their father had appointed a particular person to be his executor, if that person also claim the same, their testimony is valid, upon a favourable construction,—but not if he *deny* the appointment.—Analogy would suggest that their testimony is not valid in either case;—(and a case where two legatees attest that the testator had appointed a particular person his executor,—or where two debtors or creditors of the deceased assert the same,—or where two executors attest the junction of a third person with them in the executorship,—is subject to the same analogy;—) because their evidence is in some degree advantageous to the witnesses themselves, in as much as the advantage to be derived from it results to *them* also. The reason for a more favourable construction in this particular is that as it is the duty of the *Kázee* to appoint an executor where it is required, and where the death of the person is notorious, the evidence in question is admissible, inasmuch as it exempts the *Kázee* from this trouble, and *not* because it establishes the proof of any thing.—It is therefore a substitute for the cast of a die, which saves the trouble of election. Two brothers attesting their father's appointment of an executor must be credited, if the executor verify their testimony; and the same of the attestation of two legatees, two debtors or creditors, or two executors, to the same effect.

OBJECTION.—Where there are two executors, there is no occasion for the *Kázee's* appointment of a third, and therefore the appointment of a *third*, upon such a ground, is unwarrantable.

REPLY.—The two executors having acknowledged that the deceased had joined a third person with them, the *Kázee* is therefore required to confirm him, since, in consequence of such acknowledgment they cannot act without him.

—It is to be observed that where the debtors of the deceased attest the executorship of a particular person, their evidence is admissible, whether the death of the other be notorious or not, because such evidence is an acknowledgment affecting themselves; and the death of the creditor is therefore established with respect to them, because of their acknowledgment.

Attestation to a person's appointment of an agent is not to be credited.

If two brothers bear testimony that their absent father had appointed *Zeyd* an agent for the receipt of debts due to him at *Koofa*, their evidence is inadmissible, whether *Zeyd* claim the said agency or not;—for the *Kázee* has no power of himself to appoint an agent in behalf of an absentee; and the evidence is not in this instance sufficient to warrant it, since it is liable to suspicion.

A defendant's impeachment of the integrity of witnesses is not credited, unless he state their commission of some specific crime,

If a defendant reproach a witness with a thing which would impeach his legal integrity, but which does not involve any of the rights of the spiritual or temporal LAW, and produce evidence in support of his assertion, the *Kázee* must not hear them, nor pass a decree of the injustice of the witnesses; because this injustice is a thing of a nature which comes not within the jurisdiction of the *Kázee*, inasmuch as it is not permanent, being removeable by repentance.—Besides, the evidence adduced in this case tends to lay open faults*:—now the concealment of faults is incumbent, and the manifestation of them

* By faults is here understood *venial trespasses*, such as might destroy the legal integrity of a witness, but which do not amount to *crimes*.

prohibited:

prohibited: as, therefore, a witness, in giving evidence to this effect, is himself guilty of irregularity, his testimony cannot be heard; for the manifestation of faults is admitted only where it tends to maintain the rights of others; and that is only in such cases as fall within the jurisdiction of the *Kāzee*;—but the case in question is not of that nature; and therefore the evidence cannot be admitted.—If, however, witnesses were to give evidence that the plaintiff had himself acknowledged the irregularity of the witness, the evidence would in that case be valid; because acknowledgment is a thing which falls within the jurisdiction of the *Kāzee*.

or adduce evidence to the plaintiff's acknowledgment of their irregularity.

If a defendant bring witnesses to prove that the plaintiff had *hired* his witnesses for ten *dirms* (for instance,) such evidence must not be admitted; because, although it tend to prove something *more* than a mere *irregularity*, yet the defendant not being a regular adversary of the plaintiff in regard to this matter, has no right to establish it by evidence, since, with respect to this point, he is as it were a stranger.—If, however, the defendant be a *regular adversary*,—(as if, for instance, he should assert that the plaintiff had hired his witnesses to give evidence for ten *dirms* from property which he [the defendant] had put in his hands,)—in that case the evidence he produces in support of his allegation must be admitted; because the defendant is in this instance a regular adversary of the plaintiff in a matter of property; and the proof in regard to the property necessarily involves the proof of the reproach.—In the same manner also, the evidence adduced by the defendant is admitted where he asserts that “he had compounded with the witnesses for a certain sum of money that they should withhold their testimony in support of such unfounded claim,—and that, having accordingly paid the stipulated sum, they had nevertheless given their evidence, and he therefore prefers a claim for the sum paid to them;”—for here the proof with respect to the claim would also establish the proof of the reproach. Lawyers have observed that as the testimony of witnesses is admitted with re-

He is not allowed to adduce evidence to their being *hired* by the plaintiff,

unless his own property be involved.

spect

spect to any thing that falls within the jurisdiction of the *Kāzee*, it follows that if the defendant bring witnesses to prove that the witness of the plaintiff is a *slave*, or that he has been punished for slander, or that he is a drunkard, or a slanderer, or a partner of the plaintiff,—in all these cases the evidence so adduced must be admitted.

A witness's immediate acknowledgment of misstatement or omission, from apprehension, does not destroy his credit.

If a person give evidence, and before moving from the place, or, the *Kāzee* passing a decree upon it, declare that “ he had given a part “ of his evidence under the influence of apprehension,” still, if he be a person of character *, the deposed matter to which he adheres must be credited.—The term *apprehension*†, as here used, implies that a fault has been committed, either by withholding part of the evidence which it was incumbent to have mentioned, or by reciting, from forgetfulness, something that was false.—The reason of admitting the evidence, in this case, is because the apprehension probably arose from the awe excited by the assembly of the *Kāzee*; which is excused provided the person be just, and that he rectify his error in time.—It is otherwise where a person separates from the assembly of the *Kāzee*, and afterwards returns and says, “ I have omitted part of my evidence “ from apprehension;” for in that case his evidence would not be admitted; because there is reason to suspect a collusion with the plaintiff, which requires that caution be used; and also, because although any addition or diminution, after the delivery of the evidence, be accepted, and either added to, or deducted from, the original evidence, provided they be made in the same meeting, still this is not allowed in case of their being made at a *different* meeting. The same rule also holds with regard to the mistakes of a witness in explaining the boundaries of a house;—as if he should say (for instance) the *east* instead of the *west*; or in explaining genealogy, as if he should say (for instance) “ *Mohammed, the son of AHMID*,” instead of “ *the son of*

* Arab. *Adil*: literally, a just person; (in opposition to *Fāsil*.)

† Arab. *Tamāham*.

“**ALIE.**”—It is to be observed that the exposition of the law, in this case, applies only to the addition, by the witness, of some circumstance which may be in its nature doubtful; for if it should be in no respect doubtful, then he may at any time afterwards, whether at the same meeting or not, lawfully add it to his evidence.—Thus if a witness omit the use of the word *Shahâdit*, or the like, and afterwards declare this omission, it is in that case admitted, whether it be at the same meeting or not,—provided he be a just man.—It has been related, as an opinion of *Haneefa* and *Aboo Yoozaf*, that whatever addition or diminution a witness may make after the delivery of his evidence, shall in every case be admitted, although it be at a different meeting,—provided the witness be a just man.—But the first doctrine is the most authentic, and decrees pass accordingly.

CHAP. III.

Of the Disagreement of Witnesses in their Testimony.

WHERE the evidence adduced by a claimant is conformable to the claim, it is worthy of credit; but not where it is *repugnant* to it; because, in matters concerning the rights of the individual, the priority of the claim is requisite to the admission of evidence; and this exists in the *former* instance, but not in the *latter*, since in the *former* the object of evidence (namely, a verification of the claim) is answered,—whereas in the *latter* the evidence tends to a falsification

Evidence repugnant to the claim cannot be admitted.

of it, and it is therefore the same as if no evidence at all were produced *.

The witnesses must perfectly agree in their testimony.

THE concurrence of the witnesses, in words and meaning, is requisite, according to *Haneefa*.—If, therefore, one witness bear testimony to one thousand *dirms* being due, and the other to two thousand, no credit is to be given to either.—The two disciples are of opinion that the evidence is to be credited to the amount of one thousand *dirms*: and a similar disagreement also subsists in a case where one witness attests *one* divorce, and the other *two* or *three* divorces.—The arguments of the two disciples are that the witnesses agree in the *smallest* amount, (such as in *one* thousand *dirms*, or in *one* divorce;) and one of them, besides his agreement in this amount, attests an additional quantity.—Their evidence, therefore, must be admitted in the degree in which they concur; and the testimony of one, so far as it relates to the *excess* only, must be rejected.—The reasoning of *Haneefa* is that the witnesses differ in *words*, and consequently in *meaning*, since meaning is extracted from words. Thus *two* thousand (for instance) can never be construed to mean *one* thousand, as the terms are essentially different.—In the case in question, therefore, the *one* thousand, and the *two* thousand, respectively, are attested by only one witness; and the case is consequently the same as if their testimony had related to different articles,—as if one were to attest *dirms*, and the other *deenars*, for instance.

The witnesses may be credited to the smallest

If a person claim a debt of one thousand five hundred *dirms*, and one of his witnesses bear testimony to one thousand, and the other to one thousand five hundred, in that case the testimony must be credited

* To exemplify this case,—suppose a person were to claim the right of property in a house, on the plea of his having purchased it; and his witness attest the right of property from its having been given to him;—in that case the evidence so given would be rejected.

in the amount of one thousand *dirms**; for the witnesses concur in that amount, both in words and meaning, as one thousand is mentioned by both, and five hundred is an additional part of the speech, which adds force to the former part, instead of destroying it.—Analogous to this is one divorce and one divorce and an half; or one hundred *dirms* and one hundred and fifty *dirms*; that is to say, in both these cases the evidence is admitted in the least degree, namely, in the degree of one divorce, and to the amount of one hundred *dirms*.—It would be otherwise if one witness should attest ten *dirms*, and the other fifteen; because this is similar to the attestation of *one* thousand and *two* thousand, the effect of which has been before stated.

amount in which they agree both in words and meaning.

In a case where one witness attests one thousand *dirms*, and the other one thousand five hundred, and the claimant expressly declares that only *one* thousand *dirms* is due to him; the testimony for one thousand five hundred is null, as being falsified by the claimant†.—The effect is also the same where the claimant alleges one thousand *dirms*, and one of the witnesses attests one thousand, and the other one thousand five hundred; for here also the claimant falsifies the testimony of one of his witnesses, inasmuch as his claim is different from it. A conformity, therefore, between the claim and the evidence is indispensably necessary: and hence, if the claimant should say “my original claim was one thousand five hundred *dirms*, but I “received five hundred,” or “I exempted the debtor from five

The evidence of a witness who attests a larger sum than the claim amounts to is null.

* The difference between this and the preceding case turns entirely on the terms in which the testimony is delivered; for in the case here considered the witness, in mentioning *one thousand five hundred*, mentions the term *one thousand*, which so far coincides with the testimony of the other witnesses;—whereas, in the former instance, the witnesses coincide only in the term *thousand*, which is not perfectly definite.

† Consequently the claimant must produce another witness, as *two* are required to establish his claim.

“ hundred;” in that case each of the above mentioned testimonies would be credited, because of their conformity with the claim.

Evidence to a debt is not annulled by a subsequent declaration of part of the debt having been discharged.

If two persons give evidence to a debt of one thousand *dirms*, and one of them afterwards declare that the debtor had paid five hundred *dirms* of it, still the evidence of one thousand *dirms* being due must be credited, and that of the five hundred having been paid must be rejected.—The reason of this is, that *both* witnesses agree in the debt of one thousand *dirms*, whereas *one* witness only attests the payment of five hundred *dirms*; and as two witnesses are requisite to establish proof, the testimony in the first instance is therefore admitted as proof; and the additional declaration (of one thousand *dirms* having been paid) is rejected.—It is related as an opinion of *Abou Yoozaf* that in this case the claimant is entitled only to five hundred *dirms*, because the sum of the testimony of the witness who attests the payment of five hundred *dirms* is, that the debt in fact amounts only to *five hundred*. The above explanation, however, is a full refutation of this opinion. It is to be observed that when the witness is informed of any partial discharge of the debt, (as in the case, for instance, of *five hundred* out of the *thousand*,) he must not bear testimony to the debt of one thousand until the creditor make an acknowledgment of the receipt of five hundred; for otherwise he would be considered as aiding the injustice of the creditor.—In the *Jama Sagbeer* it is related, that if two persons attest a debt of one thousand *dirms* due by Omar to Zeyd, and one of them afterwards bear testimony to Omar having paid five hundred of it, and the claimant deny the same,—in that case their evidence of the debt, in which they both agree, must be credited; and the single testimony of one, with regard to the payment, must be rejected.—*Tabbees* reports it as an opinion of our doctors, that the evidence to the debt is not to be credited; (and *Ziffer* has adopted this opinion;) because the claimant contradicts the testimony of the payment.—To this, however, it is answered, that although the claimant do contradict this latter testimony, yet he does not contradict the first

first evidence, which is established in its validity by the concurrence of two.

IF two persons bear testimony that a certain person had killed *Zeyd*, on the festival of the sacrifice, at *Mecca*; and two others bear testimony that the said person had killed *Zeyd*, on the same day, at *Kaofa*; in such case, if all these witnesses be assembled at the same time, in the presence of the *Kázee*, the whole of their testimonies must be rejected; because, of the evidence of the *two* parties, it is undoubtedly certain that *that* of *one* of them must be false, and there is no criterion to ascertain to which the preference belongs.—If, on the contrary, the evidence of one of these parties precede that of the other, and the *Kázee* in consequence pass sentence, and afterward two others exhibit evidence of a different nature, in that case the *Kázee* must not admit the evidence of the latter, because the first evidence, in virtue of the issue of the decree consequent upon it, acquires a superiority over the latter, which prevents its annulment.

The evidence of witnesses who agree with respect to *fact* and *time*, but differ with respect to *place*, must be rejected.

IF two persons attest the theft of a cow, but differ in regard to the *colour* of it, their evidence is nevertheless valid, and the hand of the thief must in consequence be cut off.—If, on the contrary, one of the witnesses declare the animal to be a *cow*, and the other allege that it is a *bull*, their evidence, in such case, is not admissible, and the hand of the thief must not be cut off.—This is the doctrine of *Hanefah*.—The two disciples maintain that the thief is not to suffer mutilation in either case. Some have said that this disagreement proceeds on the supposition of the attested colours being in some degree similar, such as *red* and *black*, and not where they differ completely, such as *black* and *white*. Others again have said that it subsists in all cases where the witnesses differ with respect to the colour. The reasoning of the two disciples is, that the theft of a *black* cow is different from that of a *white* cow; in other words, they are two distinct animals; and hence

Evidence to the theft of an animal is not annulled by a difference between the witnesses with respect to the *colour*, but it is so by a difference with respect to the *sex*.

the due quantity of evidence (namely, that of *two witnesses*) does not appear with respect to either allegation of theft.—It is therefore the same as if two persons were to testify that a certain person had *usurped* the cow of such a person, but to disagree with respect to the *colour* of the cow;—in which case the evidence of both would be rejected; and so also in the present instance, *a fortiori*, because the penalty annexed to theft (namely, *amputation*) is of a most grievous nature. Hence a difference of the witnesses with respect to the *colour* is the same as a difference with respect to the *gender*.—The argument of *Haneefa* is, that in a case of difference between the witnesses concerning the *colour* of the animal, it is possible to reconcile the contradiction by supposing the witnesses to have viewed the cow from a distance, and in the night-time, since thefts are most commonly perpetrated at that season;—and colours are of a deceptive nature:—cattle, moreover, are often *pye-balled*; and it is therefore possible that the cow may be black on one side, which was seen by one of the witnesses, and white on the other side, which was seen by the other witness.—It is otherwise in a case of *usurpation*, since that most commonly happens in the day-time, and consequently the fact is most probably seen in the light, and near at hand. It is also otherwise with respect to the *sex* of the animal, since two sexes cannot unite in the same creature. Besides, a knowledge of the sex requires a close inspection, and hence the case does not admit of uncertainty.

Evidence to prove a contract is annulled by any difference with respect to the terms of the contract,

IF one person attest that *Zeyd* had purchased a slave for one thousand *dirms*, and another that he had purchased the said slave for fifteen hundred *dirms*, in that case the evidence of both is null; because the object of the evidence is to establish a cause of property, namely, the contract of sale; but the mention of two prices necessarily implies the existence of *two* contracts; and the proof of either of these is defective, as there is only one witness to each. This case proceeds on the supposition of the *buyer* being the plaintiff; but the effect is the same in case of the claim having been made by the *seller*;—and it

matters

matters not whether, of the two sums attested, the plaintiff claim the largest or the smallest; because the proof is defective on either supposition, for the reason already explained.—The same rule also holds with respect to a contract of *Kitábat*; that is, where a *Mokátib* and his master disagree with respect to the amount of the ransom or consideration of *Kitábat*, and the two witnesses likewise disagree in their testimony, the evidence, in such case, is null, since the object of it (namely, the establishment of the contract of *Kitábat*) is defective, for the reasons already explained;—and this, whether the *master* or the *slave* be the plaintiff. It is also the same with respect to *Khoola*, manumission for a compensation, and composition for wilful murder, provided the claim be preferred by the wife, the slave, or the murderer;—because in all these cases the object of the evidence is the same, (namely, the establishment of the existence of a contract,) and is defeated by any disagreement of the witnesses.—But if, in any of these cases, the claim be preferred by the opposite party, it then becomes equivalent to a case of debt, and the law takes place accordingly.—Thus, if the claim be for one thousand five hundred *dirms*, and one of the witnesses declare it to be one thousand, and the other one thousand five hundred, in that case, according to all our doctors, a decree must be given for one thousand *dirms*.—If, on the contrary, the claim be for two thousand *dirms*, and one witness attest to one thousand, and the other two thousand, in that case nothing can be decreed, according to *Haneefa*; whereas, according to the two disciples, one thousand must be decreed.—The principle on which these cases resemble debt is, that the pardon for murder, the freedom of a slave, or the divorce of a wife, is established by the acknowledgment of the person to whom each of these rights appertain.—Hence, in such case, his *claim of debt* only remains, and there is no occasion for the proof of the contract.—In the case of a *pledge*, if one witness attest that it was pawned for one thousand *dirms*, and the other that it was pawned for one thousand five hundred, and the claim be preferred by the pawner, the evidence is in that case inadmissible; because the pawner has no
advantage

except it regard a woman's dower, when she is entitled to the smallest sum testified.

advantage in preferring such a claim, since he cannot resume his pawn until he pay the debt opposed to it.—His claim, therefore, is not regarded; and such being the case, the evidence he adduces is, as it were, evidence without a claim; and evidence without a claim is inadmissible.—If, on the contrary, the claim be preferred by the pawnholder, it is the same as a claim for debt.—In a case of *hire*, if one witness testify to one thousand *dirms*, and the other to one thousand five hundred, then, provided this difference happen at the beginning of the term of hire, it is analogous to a similar difference concerning a *sale*; but if it happen after the expiration of the term, and the claim be preferred by the hirer, it is a claim of *debt*.—In a case of *marriage*, if one of two witnesses testify to a dower of one thousand *dirms*, and the other to a dower of fifteen hundred, the dower is established in the amount of one thousand *dirms*, according to *Haneefa*, whether the claim be preferred by the husband or wife, and whether it be for the smallest or greatest of the attested sums. This is according to a favourable construction. The two disciples, arguing from analogy, maintain that the evidence is totally inadmissible.—(It is, however, recorded in the *Amdlee*, that the opinion of *Abou Yoosaf*, in this instance, accords with that of *Haneefa*.)—The reasoning of the two disciples, in support of their opinion, is that the disagreement of the witnesses with regard to the amount of the portion is in fact a disagreement with regard to the *marriage contract*, since the object of both is the establishment of a cause, namely, the said contract;—the disagreement in this instance, therefore, is analogous to a similar disagreement with regard to *sale*.—The reason for a more favourable construction of the LAW in this particular, as adopted by *Haneefa*, is that *property*, in the case of marriage, is merely a subordinate point, the original object of it being to legalize generation, to unite the sexes, and to endow the man with a right in the woman's person. Now as there is no difference whatever upon these points, they are accordingly established in the first instance; and if any disagreement then occur concerning the subordinate or dependant point, the smallest sum attested is decreed, since

since to that amount both witnesses agree.—What is here advanced, that the case is the same “whether the claim be for the *smallest* or for the *greatest* attested sum.”—is approved.—Some of the learned have said, that the difference of opinion between *Haneefa* and the two disciples proceeds only on the supposition of the claim having been preferred by the woman: for that, in case of the claim being made by the husband, they are all agreed in regard to the inadmissibility of the evidence; since his object can only be the establishment of the *contract*, whilst the object of the woman is the *property*.—Others again have said that this difference of opinion obtains in either case; and this is approved.

CHAP. IV.

Of Evidence relative to Inheritance.

IT is a rule, that if an inheritee's * right of property in any thing be proven, still a decree cannot pass in favour of the heirs, until proof be adduced of the death of the inheritee, and of their right of heritage.—This rule obtains with *Haneefa* and *Mohammed*. *Abou Yoosaf* main-

Evidence must be adduced to prove the death of the inheritee and

* Meaning, the person from whom inheritance is derived. The translator is aware that this term is not sanctioned by authority, *Ancestor* being the phrase generally used in our law-books.—The nature of the *Mussulmen* laws of inheritance, however, renders it necessary to adopt some term of more general import, since, according to these, inheritance may either *ascend* or *descend*.—The translator, therefore, has adopted this term, both in order to avoid the inconvenience of a perpetual paraphrase, and also because it literally expresses the sense of the *Arabic* term *Mawris*, signifying “*inherited from*.”

the right of
the heirs, be-
fore inheri-
tance can
take effect.

It suffices that
the witnesses
attest either
the property
or possession of
the inheritee
at the time of
his death.

tains that the thing must be immediately decreed to the heir; for he alleges that the property of the heir is, in fact, the property of the inheritee, and consequently that evidence to the inheritee's right of property in any thing is, in fact, evidence to his heir's right of property in that thing.—*Haneefa* and *Mohammed*, on the contrary, allege that the right of the heir is inchoate and extant *de novo*, with respect to all the rules to which the inherited property is subject; (whence it is that a course of abstinence is enjoined upon an heir, with regard to an inherited female slave,—and likewise, that whatever a *poor* inheritee may have received by way of charity is lawful to his rich heir;) and the right of an heir being inchoate and extant *de novo*, it is indispensable, in such case, that the witnesses bear testimony to the shifting of the right from the inheritee to the heir,—in other words, that they attest the inheritee to have died, and to have left the article in question as an inheritance to his heirs.—They deem it sufficient, however, in order to prove the shifting of the right of property, that the witnesses attest that “the thing in question was the property of “the inheritee at *the period of his death* ;” for then the shifting is established from necessity;—and in the same manner, it suffices if they attest that “it was in the *keeping and possession* of the inheritee at the “time of his death ;” for although the possession of an article may have been in virtue of a deposit, or of usurpation, yet the possession at death, in either case, is in fact a possession in virtue of the right, because of the obligation of responsibility which then takes place:—in a case of usurpation evidently; and also in a case of *deposit* *, because of the death of the trustee without any explanation;—in other words, if a trustee should die, without explaining that a particular thing in his possession is the deposit of a particular person, it occasions responsibility, because the trustee, in dying without explaining the case, was most certainly guilty of a want of care of the deposit; and a want of care of a deposit is a transgression with respect to the deposit, which

* See *Deposit*.

induces

induces responsibility.—Evidence, therefore, of a thing being in the possession of a certain person at his death, is equivalent to evidence of its being his property.

HAVING thus explained the tenets of each of our doctors upon this subject, it follows that if witnesses were to give evidence that a particular house was in the possession of a certain man at his death, the evidence so given must be admitted with respect to the claimant being the heir of the deceased. In the same manner also, the testimony of witnesses must be admitted, where a person adduces evidence to prove that a particular house, in the possession of a certain person, was the property of his father, and that his father had lent it, or had delivered it in deposit to the person then possessing it. In this case, therefore, the said person is entitled to take the house from the present occupier, without being required to prove, by witnesses, that his father had died, and that the said house had been left to him in inheritance.—This, according to the tenets of *Aboo Yoozaf*, is evident:—and so also according to the tenets of *Haneefa* and *Mohammed*; because in the case in question it has been shewn, by the testimony of witnesses, that the father was in possession at the time of his death, inasmuch as the possession of a borrower or trustee is equivalent to *his own* possession; and on this account there is no necessity for proving the shifting of the property to the heir, since that is a consequence of the proof of the possession, as has been already explained.—It is to be observed that the law is the same where, under these circumstances, the claimant asserts the possession of the other to have been in virtue of a lease; because the possession of a lessee is equivalent to the possession of the lessor.

An heir may recover an article in possession of another by proving it to have been the property of his inheritor, or a loan or deposit from him.

If a person claim a right of property to a house in the possession of another, and the testimony of the witnesses produced by him should run in this manner, “we testify that the said house was in the possession of the claimant *one month ago*,”—such evidence must not be

The right to an article is not established by evidence to the former possession of it.

admitted.—This is the doctrine of the *Zábir Rawáyet*.—It is related as an opinion of *Aboo Yousuf*, that the evidence, in this case, is admissible; because *possession* is an object in the same manner as *property*; and as the testimony of the witnesses would have been accepted, in case they had said that the house in question was the *property* of the claimant one month ago, it follows that it must be admitted in this case also.—Besides, if the witnesses had deposed that the other had taken the house from the hands or possession of the claimant, their evidence would have been admitted, and the claimant would, in consequence, have been put in possession of the house. The doctrine of the *Zábir Rawáyet*, in this particular, has been adopted by *Haneefa* and *Mohammed*: and the arguments in support of it are twofold.—FIRST, the seizin of the present possessor is actually seen with the eye; whereas that of the claimant, which formerly existed, is only heard from the tongue of the witnesses; and knowledge from *hearsay* can never be put in competition with that from actual sight.—SECONDLY, the evidence, in this case, relates to a matter of uncertainty; since the former seizin of the claimant, not being definitely known, admits of three suppositions, as it may have existed in virtue either of right of property, of deposit, or of usurpation;—and where the point is of so uncertain a nature, it is impossible to pass a decree upon the possession.—It is otherwise where the witnesses attest the right of property, as that admits not of various suppositions;—or, where they attest that the house had been taken from the claimant; because this is a matter of certainty, of which the law is known, namely, the obligation of restitution, or of replacing the thing, as it formerly stood, in the possession of the claimant.

unless the defendant acknowledge such former possession,

If the possessor of the house should himself acknowledge the former possession of the claimant, in that case a decree must pass for restoring the claimant to his possession; for the uncertainty with regard to the subject of an acknowledgment is no bar to the validity of the acknowledgment itself.

IF two persons attest the acknowledgment of the defendant, that "the thing in his possession had formerly been in the possession of the claimant," the article in question must in that case be restored to the claimant; because, although the subject of the acknowledgment be a matter involved in uncertainty, yet the evidence here relates, not to it, but to the acknowledgment itself, which is a matter of certainty;—and the uncertainty in the subject of it is no bar to the decree of the *Kânet*, since he may afterwards desire the acknowledger to explain the nature of the uncertainty.

or two witnesses attest his having made such acknowledgment.

CHAP. V.

Of the Attestation of Evidence.

AN attestation of evidence is admissible in all such rights as do not drop in consequence of a doubt; because there is a necessity for this, since it may happen that a witness, from various causes, (such as *sickness*,) may not be able to give his evidence in person; whence, if an attestation of his evidence were not admissible, the rights of mankind would often be destroyed. There is, however, a degree of doubt attending it; because the *secondary* witness, in such case, is merely a substitute for the *primary* witness;—and if there be *many* gradations between him and the primary, the suspicion of falsehood becomes still stronger.—There is, moreover, a possibility of avoiding this expedient, by desiring the party to produce, independant of the witness whose attendance is impracticable, some other who is also a primary witness.

Attestation of evidence is admitted in all matters not liable to be affected by doubt.

witness.—An attestation of evidence, therefore, is never admitted where it tends to establish a matter which is repelled by the existence of a doubt, such as *punishment* or *retaliation*.

The attestation of the same two witnesses suffices to prove the evidence of two:

THE attestation of two men with regard to the evidence of two others is valid. *Shaf'ei* maintains that the evidence of four men is necessary to authenticate that of two men; because, in his opinion, two secondary witnesses are equivalent to one principal, in the same manner as two women are equivalent to one man. The arguments of our doctors in support of their doctrine upon this point, are two-fold.—FIRST, *Alee* has declared that an attestation of the evidence of one man is not admissible unless attested by two.—SECONDLY, the stating the evidence of a principal or original witness is included in the number of rights. If, therefore, two men testify to the evidence of a principal witness, and afterwards testify to the evidence of *another* principal witness, both evidences are valid; nor is it required that the evidence of each principal witness should be testified by two *separate* secondary witnesses.

but the evidence of each must be attested by the two respectively.

THE attestation of one person to the evidence of one witness is not admissible, because of the opinion of *Alee*, as before quoted.—*Malik* admits the attestation of one person to the evidence of one witness.—The precept of *Alee*, however, is in proof against him.—Besides, the evidence of one principal witness is included amongst the number of rights, and therefore requires to be proved by two witnesses.

The attestation must be at the desire of the primary witness, who must state the terms of his testimony to the

It is requisite that the principal witness desire the secondary to bear testimony to his evidence, after the following manner,—“ Bear testimony to my evidence, which is, that A. the son of B. has made an acknowledgment before me to a particular effect, and has desired me to attest the said acknowledgment.”—The reason of this is that the secondary witness is a deputy of the principal, and it is therefore necessary

necessary that he appoint him his agent, and desire him to bear evidence in the manner above related.—It is also requisite that the principal give his evidence to the secondary, in the same manner as he would have done in the assembly of the *Kāzee*, in order that he [the secondary] may report the same literally, in that assembly.—It is to be observed, however, that if the principal should not mention that “A. the son of B. had called him to witness his acknowledgment,” still his attestation is valid; because whoever hears another make an acknowledgment may lawfully give evidence of the same, although the acknowledger should not have desired him to bear testimony.

swelling
witness.

It is requisite that a secondary witness deliver his testimony in the following manner:—“*Zeyd* has called upon me to attest his evidence that *Omar* has made an acknowledgment before him to a particular effect, and that he had desired him to bear testimony to his evidence of the said acknowledgment.”—All this is required, because it is necessary that a secondary witness recite the substance of the evidence of the principal, and specify that he had called upon him to bear testimony to it.

Form of an
attestation.

If *Omar* hear *Zeyd* assert that a particular person had desired him to bear testimony to some circumstance, it is not in that case lawful for *Omar* to attest the said evidence of *Zeyd*, unless *Zeyd* should have particularly called upon him to attest the same; because, in the attestation of evidence, that of having been *called upon* to attest it is a necessary condition. This is according to all our doctors:—according to *Mohammed*, because, in his opinion, the decree of the *Kāzee* passes on the strength of *both* evidences; that is, of the principal and the secondary; and also because both of them are liable, in an equal degree, to the penalty in case of a recession from their evidence:—and according to *Haneefa* and *Abou Yoofoof*, because, in their opinion, a repetition of the evidence of the principal witness before the *Kāzee* is necessary

A person cannot attest the attestation of another, unless that other desire him so to do.

fary for the establishment of proof; and therefore the circumstance which establishes the proof ought to be explained.

Attestation is admitted only in case of the death, absence, (at a distant place) or sickness of the primary witness.

THE attestation of evidence is not admissible excepting where the principal witnesses have died, or have departed to a distance of three days journey or upwards, or are so sick as to be unable to attend at the assembly of the *Kāzee*.—The reason of this is that the attestation of evidence is admissible only from necessity; and this necessity exists only where the principal witnesses are unable to give their testimony personally, which inability exists in all these cases.—It is to be observed, that, in case of the absence of the principal witnesses, the distance must be estimated by the time requisite to travel it; because the incapability of appearing to give evidence is founded on the distance, which the LAW estimates from the length of time. It is related, as an opinion of *Abou Toosaf*, that if the absent person be at a place so situated as that, having occasion to appear in the assembly of the *Kāzee* in the morning, he could not return to his family that day, in that case it is lawful to accept, for the preservation of the rights of mankind, an attestation of his evidence. Lawyers, however, remark that the former doctrine is the most authentic, as in this latter case there is no great inconveniency; and *Abou Leys* has also given this exposition upon the point.

The attesting witnesses may appear as purgators on behalf of the primary witnesses;

The justification of the original witnesses by the secondary is admitted, because they are capable of being purgators.—In the same manner also, the justification of one witness by another witness is valid, for the like reason; and also because the effect of it is advantageous to him, since the *Kāzee* will in consequence of it pass a decree. It is likewise to be observed, that this degree of advantage does not subject a just man to any degree of suspicion; in the same manner as he lies not under any suspicion from the delivery of his own evidence. A just man indeed cannot possibly lie under suspicion from his justification

cation of another witness, because his testimony is credible in itself, although that of the other be rejected.

If secondary witnesses remain silent with respect to the justification of the principal witnesses, it is valid; that is to say, the testimony of the principal witnesses, as recited by them, must be admitted; and the *Kázee* must scrutinize into their characters from others. This is according to *Aboo Yoosuf*. *Mohammed* has said that in this case the original evidence, as recited by the secondary witnesses, must not be admitted; because the validity of evidence is founded entirely on the probity of the witnesses; and it consequently follows, that unless the secondary witnesses explain the probity of the principals, their testimony repeated by them cannot be received as valid evidence. The reasoning of *Aboo Yoosuf* is, that the business of secondary witnesses is merely to recite the evidence of the principals, and not to exhibit a justification of them, since it may often happen that they are ignorant of the probity of the principals. Besides, after they have recited their evidence, it is the business of the *Kázee* to examine into their probity, in the same manner as if they were actually present.

but their not doing so does not affect the evidence which they attest.

If the principals *deny* the evidence recited on their part by the secondaries, the evidence of the secondaries must not be admitted, because of the want of proof, from the contradiction which subsists between them and the principals.

The denial of the primary witnesses annuls the attestation.

If two men bear testimony to the evidence of two others, to this effect, that "a certain woman, the daughter of a native of *Samarcanid*, "has made an acknowledgment of one thousand *dirms* in favour of "Zeyd,"—and these secondary witnesses further declare, that the principals had informed them, that they knew the person of the woman,—and the plaintiff produce a woman, and the secondary witnesses declare that "they do not know whether she is the woman in "question or not,"—in that case the plaintiff must be desired to pro-

If the attesting witnesses have not a clear personal knowledge of the defendant, the identity must be proved by other witnesses;

and so also,
with respect
to the limits
of the claim.

The identity
of a person as-
serted by a
Kázee's letter
must be
proved.

duce two witnesses to testify the woman's identity; for here the evidence of the witnesses tends to prove the claim upon an uncertain person, whereas the plaintiff claims his right from a person specific and present; and hence a doubt arises, to remove which it is requisite to ascertain the person.—Analogous to this is a case where two witnesses bear testimony to the evidence of two others, that “ a “ certain person sold a piece of ground circumscribed by particular “ boundaries, and the price is due by the purchaser;”—for here it is requisite to produce two other witnesses to attest that the said ground, circumscribed by the said boundaries, had been delivered over to the purchaser, who is the defendant;—and in the same manner also, it is requisite to produce two other witnesses, in case the defendant deny that the boundaries of the ground he had purchased are the same with those described in the evidence of the witnesses; to the end that these additional witnesses may bear evidence that those boundaries were the same with those of the ground in the possession of the purchaser.—The law is exactly the same with regard to the letters of one *Kázee* to another;—as where one *Kázee* writes to another, that “ two witnesses “ have given evidence that a debt of one thousand *dirms* is due to a “ certain person, the son of a certain person, of a certain family, by “ the daughter of a certain person of a certain family, and that he “ must pass a decree for the said daughter's payment of the said sum;” for here, if the plaintiff, after delivering the letter to the *Kázee* to whom it is addressed, produce a woman, the *Kázee*, before he passes the decree, must desire him to bring two witnesses to attest that she is the same woman as described in the letter of the other *Kázee*.—It is to be observed that if, in either of these cases, (namely, attestation of evidence, or of the letters of one *Kázee* to another,) in the specification of the family of the woman, the witnesses make use of the term *Tameemia*, it is not valid; it being necessary to specify some nearer and more particular branch to which the woman is related, in order that a particular knowledge may be acquired, which cannot be done in case of the specification of so general a branch as that of *Tameen*, whole

whose descendants are innumerable.—It is the opinion of some that the word *Farghaniá* implies a general, and *Auzcbândiá* a particular family.—Some, also, think that the words *Samarcándia* or *Bokhária* are general; and some have said that the reference to a small lane is particular, and to a street or city general.—It is to be observed that, according to the *Zábir Rawdyet*, the opinion of *Haneefa* and *Mohammed* (in opposition to that of *Abou Yoozaf*) is that description is rendered complete by the specification of the *grandfather*; but that the specification of the particular family (which is termed *Fakhiz**) is equivalent to the mention of the grandfather; since it is the name of a *distant* progenitor, which is equivalent to a *nearer* one.

SECTION.

HANEEFA is of opinion that a false witness must be stigmatized†, but not chastized with blows. The two disciples are of opinion that he must be scourged and confined; and this is also the opinion of *Shafei*. The arguments of the two disciples upon this point are twofold.—FIRST, It is related of *Omar*, that he caused a false witness to be scourged with forty stripes, and to have his face blackened with the foot of a pot. SECONDLY, false testimony is a great crime, of which the evil results to others; and as no stated punishment has been ordained for it in the LAW, it must therefore be punished by *Taxeer*, or discretionary correction. The arguments of *Haneefa* are also two-

A false witness must be stigmatized.

* To understand the whole of this passage, it is proper to remark that of tribes among the *Arabians* there are six degrees, I. *Shoob*, II. *Kabeela*, III. *Faawla*, IV. *Omira*, V. *Batu*, VI. *Fakhiz*;—in which last are included the nearest kindred. (*Richardson's Dictionary*.)

† Arab. *Yusháhere*, from *taah-har*, which literally signifies *arising in public*; a mode of punishment somewhat similar to the *stocks* or *pillory*.

fold.—FIRST, *Shirreeb* stigmatized a false witness, but did not scourge him. SECONDLY, prevention of the crime in future may be effected by stigmatizing, and it ought therefore to be adopted as sufficient; for were beating or scourging enjoined in such cases, it might operate to the concealment of the crime, and the consequent destruction of the rights of others;—in other words, as being a grievous punishment, the fear of it might deter false witnesses from a confession of their falsehood. With regard to the relation concerning *Omar*, it evidently alludes to the infliction of punishment on a criminal, as appears by the number of stripes, (namely forty,) and the blackening of the countenance.

Mode of stig-
matizing a
false witness.

THE mode of stigmatizing a false witness, as prescribed by *Shirreeb*, is this.—If the witness be a sojourner in any public street or market-place, let him be sent to that street or market-place; or, if otherwise, let him be sent to his own tribe or kindred, after the evening prayers, (as they are generally assembled in greater numbers at that time than any other;)—and let the stigmatizer inform the people that “*Kázee Shirreeb* salutes them, and informs them, that he “ has detected this person in giving false evidence; that they must “ therefore beware of him themselves, and likewise desire others to “ beware of him.” *Shimfal Ayma* has said that a false witness ought also to be *stigmatized*, according to the two disciples; and that the degree of correction and imprisonment ought (according to them) to be left to the discretion of the *Kázee*.—(The nature of discretionary correction has been already explained under the head of *Punishments*.) It is related in the *Jama Sagbeer* that if two witnesses confess that they have given false evidence, they must not be scourged. The two disciples maintain that they are to be scourged at the discretion of the *Kázee*.

HEDÁRA.

H E D A R A.

B O O K XXII.

Of RETRACTION of EVIDENCE.

IF witnesses retract their testimony prior to the *Kázee* passing any decree, it becomes void; (that is to say, the *Kázee* must not pass any decree upon it;) for the right of the claimant cannot be established but by the decree of the *Kázee*; and the *Kázee* cannot pass a decree upon contradictory testimony:—and in this case the witnesses are not liable to make atonement, since they have not occasioned any injury to either of the parties. If, on the contrary, the *Kázee* pass a decree, and the witnesses afterwards retract their testimony, the decree is not thereby rendered void; because, although the first allegation on which the decree passed be contradicted by the latter, and although the first

Evidence retracted before a decree, is void:

but not if retracted after a decree has passed.

and

and the last in point of credit stand upon an equal footing, yet the first, because of the sentence of the *Kāzee* having passed in conformity to it, acquires a superiority which prevents its annulment.—In this case, however, the witnesses are bound to atone for the injury they may have occasioned by their false testimony; for they themselves acknowledge a thing which is the cause of responsibility; and contradiction is no bar to the validity of acknowledgment, as shall be hereafter explained.

The retraction must be made in open court.

THE retraction of evidence is not valid, unless it be made in the presence of the *Kāzee*; because, being a destruction of evidence, it must consequently be restricted to that place which is particularly appointed for the reception of evidence,—namely the assembly of the *Kāzee*,—(that is to say, of any *Kāzee* whatever.)—Besides, retraction of false evidence resembles repentance of a crime; and repentance of a crime, if committed privately, must be performed privately, and if committed openly, must be performed openly.—As, therefore, retraction of evidence is not valid, unless made in the assembly of the *Kāzee*, it follows that if the defendant should aver that the witnesses had retracted their testimony some where out of the assembly of the *Kāzee*, and should either require that an oath to this effect be administered to them in the assembly of the *Kāzee*, or offer to produce witnesses there to prove his assertion, yet neither would the oath be administered to those witnesses, nor would the evidence he offers to produce be accepted, since the plea on which he proceeds (namely, an *invalid* retraction) is of no effect. If, on the contrary, his plea be of an effectual nature, (as if he should assert that the witnesses had retracted their testimony before a certain *Kāzee*, who had in consequence passed a decree for their making reparation,) the evidence he offers must be admitted, because he in this instance grounds his plea upon a valid retraction.

If two witnesses bear testimony that a particular sum is due by a certain person to another, and the *Kāzee* accordingly pass a decree for the payment of it, and the witnesses afterwards retract their evidence, they are in that case responsible to that person for the sum decreed against him; for whoever, by a transgression, performs an act destructive of another's property, becomes responsible for the same; (in the same manner as the digger of a well on the high road *;)—and in this case the witnesses have been guilty of a transgression in giving false evidence, which occasioned the loss of the defendant's property.—*Shaf'ei* maintains that they are not responsible; for they, in fact, only produce the *cause* of the destruction, and that is not regarded where those are present who actually worked the destruction, namely (in the present instance) the *Kāzee* and the plaintiff.—In reply to this, our doctors argue that to impose the responsibility, in the case in question, upon the actual operator of the destruction (namely the *Kāzee*) is impracticable; because, in passing the decree, he acted as it were from necessity; and also, because, if a *Kāzee* were thus liable to responsibility, no one would accept the office of *Kāzee*, from an apprehension of being subject to such penalties.—In the same manner also, it is impracticable to exact the compensation from the plaintiff, because the decree of the *Kāzee* takes effect independent of him. In this case, therefore, regard is necessarily had to the producer of the *cause*.—It is to be observed, however, that the witnesses do not become responsible unless the plaintiff obtain possession of the property in question, whether it be substance or debt; because the destruction of it is not established until after the seizure of the plaintiff; and also because the defendant is not, until then, subjected to any thing except the mere *obligation of debt*, whereas what he is to take from the witnesses is *actual substance*; and it is not lawful to take substance as a compensation

Witnesses retracting their testimony after a decree has passed, must make a compensation to the suffering party;

provided the decree had been actually enforced against him.

* If a person dig a well in the high road (where no person is entitled to dig a well, and which is of course a *transgression*) he is liable to a fine for any accident which may happen by people falling into it, &c. This is fully explained in treating of *Fines*.

for

If one witness thus retract, he atones for a moiety of the damage;

and the same of any number who may retract, where one witness perseveres in his testimony.

for the mere *obligation* of a debt, since compensation can only be made in a *similar*, and there is no similarity between *debt* and *substance*.—If, in the case in question, only *one* of the witnesses retract his evidence, he becomes responsible for a *half* of the property: for it is a rule that where part of the witnesses retract, the right shall remain established so far as relates to the remaining witnesses.—Hence if *three* persons give evidence concerning property, and one of them afterwards retract his testimony, he is not subject to any responsibility, because the whole of the right remains established in virtue of the two remaining witnesses. The reason of this is that the right of the claimant is established because of the complete proof, namely, the testimony of two witnesses. If, however, another of those three witnesses afterwards retract his evidence, the two receding witnesses are in that case responsible for one half of the property, since, in virtue of the existence of one witness, one half of the right remains in force.

Cases of retraction where the witnesses consist of both males and females.

If one man and two women give evidence, and one of the women afterwards retract her testimony, she is liable for one fourth of the right; because, in consequence of the existing evidence of one man and one woman, three fourths of it still remain in force. If, also, *both* the women retract their testimony, they are responsible for an half, since in virtue of the existing testimony of one man an half of the right still remains in force.

If one man and ten women give evidence, and eight of the women afterwards retract, those eight are not liable to any compensation, since the remaining evidence furnishes complete proof. If, on the contrary, *nine* of the women retract, those nine are responsible for a fourth, since the remaining evidence of one man and one woman establishes three fourths of the right.—If, in the case in question, the *whole* of the witnesses retract, the man is in that case responsible for one sixth of the right, and the ten women for five sixths, according to *Haneefa*. *Abou Yoosaf* holds that the man is liable for an half, and the

ten women for an half; because, although they greatly exceed in point of number, yet they are in fact only equivalent to one man, since their evidence is not admissible unless it be in conjunction with that of a man. *Haneefa*, on the other hand, argues that the evidence of every two women is equivalent to that of one man; because the prophet, on account of the weakness of their understanding, has ordained that the evidence of two women shall be equivalent to that of one man. Hence, in the case in question, it is the same as if six men had given evidence and had afterwards retracted it.—If the ten women retract, and not the *man*, they are responsible for an half of the right, according to all our doctors, in conformity with the rule before-mentioned.

If two men and one woman give evidence in a matter of property, and all of them afterwards retract, the whole of the responsibility rests on the two men, and none on the woman, because one woman is no more than half of a witness, whence the law regards not her in this case, inasmuch as no effect results from the mere part of a cause.

If two witnesses give evidence concerning a woman, of her being married on a *Mibr Misl*, or *proper dower**, and afterwards retract their testimony, they are not bound to make any compensation†; and so likewise, if they testify to any thing *short* of the proper dower; because the advantage to be derived from the woman's person is not an article of value where it is lost to her by false evidence; for compensation, in case of the destruction of any thing, implies the return of a similar; and there is no similarity between substantial property and the conjugal enjoyment.

The retraction of evidence to a marriage and *proper dower* does not subject the retractors to any responsibility.

* This case supposes that the woman claims a *stipulated dower*, *greater* than her proper dower, and that the husband endeavours to resist her claim by evidence.

† That is, they are not to compensate for the difference

If two witnesses give evidence concerning a man, of his having married a woman on a proper dower, and afterwards retract the same, still they are not bound to make any compensation, although by their testimony they have destroyed the property of that man; because the destruction in this instance is attended with an equivalent, inasmuch as the connubial enjoyment is considered as an article of value, whenever it becomes the *right* of any one; and destruction attended with a consideration or equivalent, is the same, in effect, as no destruction. The ground of this is that responsibility is founded upon similarity. Now there is no similarity between destruction with an exchange and destruction without an exchange. If, therefore, in the case in question, a compensation were taken from the witnesses, it would be a destruction of their property without any thing in return.—If, however, the witnesses were to testify to any amount beyond the proper dower, and afterwards retract, they are in that case responsible for the excess, as having destroyed that much without any consideration in return.

The retraction of evidence to a sale does not occasion responsibility, unless a price had been attested short of the value.

If two witnesses bear evidence to a sale for a price tantamount to, or greater than, the value of the thing sold, and afterwards retract, they are not in that case liable to any compensation; since destruction attended with an equivalent is, in effect, *no* destruction.—If, on the contrary, they should give evidence of the sale for a price *less* than the value, they are in that case responsible for the deficiency of value, because, in that amount, they have occasioned a destruction without any equivalent. The law here applies equally to sale with or without an option to the seller; because, in the case of an option, the cause of right of property is the original *sale*, and not the determination of the *option*.—The effect, therefore, is referred to the *sale*, upon the determination of the option; and hence the destruction is referred to the evidence of the sale.

If two witnesses give evidence of a man having divorced his wife prior to consummation, and afterwards retract, they are in that case responsible for a moiety of the dower; because they have established upon that man a thing which stood within the possibility of dropping; (in other words, which might perhaps have been altogether cancelled, by the wife apostatizing from the faith, or admitting the son of her husband to carnal connexion *;)—and also, because separation prior to the consummation is equivalent to an annulment of the marriage, and therefore annuls the whole of the dower, as has been already explained †; but afterwards the half of the dower is established *de novo*, in the manner of a *Matdt* or present ‡, and hence the said half is rendered due by the testimony of the witnesses.

Witnesses retracting their evidence to divorce before consummation are liable for half the dower.

If witnesses attest that a certain person had emancipated his slave, and afterwards retract their testimony, they are in that case responsible to the person in question for the value of the said slave, because of their having destroyed his property in the slave without any equivalent in return.—The right of *Willa*, moreover, with respect to the slave, rests with that person and with the witnesses; because as the emancipation of the slave is not, on account of their responsibility, ascribed to their testimony, it follows that the *Willa* does not go to them.

Witnesses retracting their evidence to manumission are liable for the value of the slave.

If two witnesses hear evidence against a person, in a case of retaliation for murder, and then retract their testimony after the person has been put to death, they are in that case bound to pay a *Deeyat*, or fine of blood, but are not to suffer death by way of retaliation. *Shafai* maintains that they are to suffer death, since they were the efficient cause of death, inasmuch as the retaliation was executed on the strength of their evidence; and they therefore resemble a *Môkrib*, or compeller, (in other words, they *compel* the commission of murder;)—nay, they are still more criminal than a *Môkrib*, inasmuch as the avenger of blood

Witnesses retracting in a case of retaliation are liable to a fine, but not to retaliation.

* Vol. I. p. 182.

† Vol. I. p. 145.

‡ Vol. I. p. 125.

in a case of murder, is aided in bringing the murderer to justice; whereas a person under compulsion is prohibited, by the LAW, from putting to death *. The reasoning of our doctors is, that the witnesses, in this case, cannot be considered either as actual perpetrators, or as instrumental causes of the bloodshed; for nothing can be considered as a cause except such a thing as presses upon, and joins to, the agent; and the testimony of the witnesses cannot be considered in this light, since, notwithstanding they furnish legal grounds for the retaliation, yet pardon and forgiveness being benevolent acts, the probable consequence is that the avenger of blood will pardon the person against whom they bore evidence. It is otherwise in a case of *compulsion*; for the person compelled is induced to execute the murder with a view to save his own life, which the compeller threatens to take from him in case of his refusal; whereas, in the case in question, there is no compulsion on the avenger of blood to execute the retaliation; on the contrary, he is at free liberty either to pardon the other, or to execute the retaliation; and where a man acts from free liberty, and not from any necessity, the cause of his actions cannot be ascribed to the witnesses: at least, it must be allowed that there is a *doubt* with respect to their being the cause; and the existence of a doubt is preventive of retaliation. The *Deeyat*, or fine of blood, however, takes place; because that is a matter of property, and, as such, may be established, notwithstanding any *doubt* which may happen to attend it.

Secondary witnesses retracting their attestation are responsible

IF secondary witnesses † retract their evidence, they are responsible; since the destruction of the defendant's property is referred to them, because of their giving evidence in the assembly of the *Kázee*.

* This will be more fully and clearly understood by a reference to the article *It'rah*, or *Compulsion*.

† Meaning, witnesses who attest the evidence of other witnesses. (See Chap. V. of the preceding book.)

If,

If, on the other hand, the *primary* witnesses retract, alleging that they had not authorized the secondary witnesses to attest their evidence, they are not responsible, since they deny the evidence which occasioned the destruction of the property of the defendant. In this case, moreover, the decree of the *Kázee*, occasioned by this testimony, is not rendered null, since the denial of the primary witnesses is susceptible of doubt, (that is, it may either be false or true,) and the decree of the *Kázee* cannot be reversed by a dubious circumstance; in the same manner as it cannot be reversed by the retraction of evidence, after it has passed on the strength of that evidence.—It is otherwise where the primary witnesses make the denial *prior* to the passing of a decree; because in that case the *Kázee* would not pass the decree on the strength of the evidence of the secondary witnesses.—If, however, the primary witnesses avow that they had authorized the evidence of the secondary witnesses, but that they had committed an error in so doing, they are in that case responsible for the loss that may have been occasioned.—This is according to *Mohammed*.—The two elders are of opinion that, even in this case, the primary witnesses do not become responsible; since the decree of the *Kázee* passed upon the evidence of the secondary witnesses, from the necessity under which the *Kázee* lies of proceeding on the proof before him, which in this case is the evidence of the secondary witnesses.—The reasoning of *Mohammed* is that the secondary witnesses do only repeat the evidence of the principals; and hence it becomes in effect the same as if the principal witnesses were themselves present.

for the damage:—but the *primary* witnesses are not responsible if they retract or disavow.

If both the primary and the secondary witnesses retract their evidence, the two *Elders* are in that case of opinion that compensation is due only by the *secondary* witnesses, because of the decree having passed on their evidence. *Mohammed*, on the contrary, is of opinion that the defendant has the option of taking the compensation either from the principal or the secondary witnesses; because (according to the doctrine of the two disciples) the decree passed on the evidence of the

5

secondaries,

Case of retraction by both primary and secondary witnesses.

secondaries,—or (according to his own doctrine) it passes on the evidence of the principals; and hence the defendant has the option of taking the compensation from whomsoever of the two he pleases:—but as originality and dependancy are of different natures, it is not permitted to unite both the principals and the secondaries in the payment of the compensation; that is to say, the defendant cannot take it from both.

The secondary witnesses asserting the falsehood or error of the primary witnesses is of no effect.

If, in the above case, the secondary witnesses assert that the primary witnesses had either been guilty of falsehood, or had committed an error in their evidence, the *Kāzer* must not attend to this assertion, because his decree, as having passed and issued, cannot be affected by any assertion of theirs. And in this case the secondary witnesses are not liable to any compensation, since they have not retracted their own evidence, but have merely repeated the evidence of the principal witnesses, notwithstanding they had retracted it.

Purgators receding from their justification are responsible.

If purgators recede from their justification, they become responsible, according to *Haneefa*.—The two disciples are of opinion that they do not become responsible, because they have merely performed a generous action in behalf of the witnesses, and therefore resemble witnesses who bear evidence to the marriage of a person accused of whoredom*, and who, in case of retracting their evidence after the stoning of the person to whom it related, do not become responsible for the fine of blood.—The reasoning of *Haneefa* is that justification is the cause of credit given to witnesses, inasmuch as the *Kāzer* proceeds not upon the evidence itself, but upon the justification of it.—Hence the justification is, in effect, the moving cause of the decree.—It is otherwise with witnesses to the marriage of a person accused of whoredom, because in that instance the circumstance of the accused being a married person is particularly essential to induce lapidation†.

* Literally—"who bear evidence to *Ilshu*." (See Vol I. p. 48.) † See Vol. II. p. 2.

IF two witnesses give evidence of a *Yameen* (or suspension on a condition) of divorce or emancipation, and two other witnesses give evidence that the condition had taken place, and both parties afterwards retract their evidence, compensation is in that case due only by the witnesses who attested the deed of *Yameen*, which is the *cause* of the damage, and not by those who attested the occurrence of the event on which the divorce or emancipation was suspended; because the decree of the *Kâzee* proceeded on the evidence to the *deed*, and not on the evidence to the *condition*.—If only the witnesses to the occurrence of the condition retract, there exists in that case a difference of opinion amongst the *Hanefite* doctors.—It is to be observed that by the *divorce* here mentioned is to be understood divorce before consummation; for in a case of divorce *subsequent* to consummation neither party of the witnesses are liable to make compensation, because the wife's right to her dower is established by the consummation *.

Case of retraction in suspended manumission or divorce.

* See Vol. I. p. 123.

ERRATA in the SECOND VOLUME.

Page 12, line 17, *for* " of blessings," *r.* " of *the* blessings."

26, (note,) — *fricens*, *r.* *fricens*.

31, (note,) — *Copulata*, *r.* *Copulator*.

36, line 18, — suspension, *r.* fuspicion.

48, (note,) — *Monákkes*, *r.* *Moorakes*.

50, line 5, — sentenced, *r.* sentence.

76, — 30, — *Jáfir*, *r.* *Jáfir*.

83, — 8, — " or (larciny, namely)," — *r.* " or Larciny, (namely)," —

84, — 20, — *airms*, *r.* *dirms*.

—, — 30, — corroboration, *r.* corroboration.

109, — 3, — inclofed, *r.* included.

132, — 6, — off, *r.* of.

163, — 1, — *Imám*, *r.* *Imám*.

166, — 1, — *Imám*, *r.* *Imám*.

210, — 27, — obtained, *r.* obtains.

236, — 12, — person, *r.* power.

396, — 6, — " manner in the," *r.* " manner *as* in the" —

435, — 29, — lesser, *r.* lessor.

451, — 14, — whither, *r.* whether.

452, — 2, — strangers, *r.* stranger.

484, — 19, in " form of the price," dele of.

492, — 24, — relates, *r.* exists.

503, (title Chap. X.) *for* other, *r.* others.

508, — 13, — fell, *r.* sell.

541, — 10, — opinion, *r.* option.

564, (last note,) *for* copper, *r.* silver.

607, line 23, *for* *Mabeel*, *r.* *Mobeel*.

690, (note,) *for* depravid, *r.* depraved.

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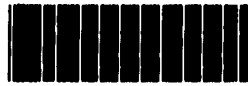
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